Form No. 7

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EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

NO. 2574

United States

Circuit Court of Appeals

For the Ninth Circuit

M. P. FLEISCHMAN,
Plaintiff in Error,

vs.

JULIUS RAHMSTORF,
Defendant in Error.

Transcript of Record

Upon Writ of Error to the United States District Court for the Territory of Alaska. Fourth Judicial Division.

Fairbanks News-Miner, Fairbanks, Alaska.

NO._____

United States

Circuit Court of Appeals

For the Ninth Circuit

M. P. FLEISCHMAN,
Plaintiff in Error,
vs.
JULIUS RAHMSTORF,
Defendant in Error.

Transcript of Record

Upon Writ of Error to the United States District Court for the Territory of Alaska, Fourth Judicial Division.

Due service and receipt of three copies hereof admitted this 5th day of February, 1915.

G. B. Edmunds

Attorney for Defendant in Error.

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Names and Addresses of Attorneys of Record.

G. B. ERWIN, Attorney for Plaintiff and Defendant in Error, Fairbanks, Alaska;

L. R. GILLETTE, Attorney for Defendant and Plaintiff in Error, Fairbanks, Alaska.

In the United States District Court for the Territory of Alaska, Fourth Judicial Division.

No. 1878 Civil.

JULIUS RAHMSTORF,

Plaintiff,

vs.

M. P. FLEISCHMAN,

Defendant.

Praecipe for Transcript of Record.

To Hon. Angus McBride, Clerk of the above entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the writ of error heretofore sued out to said court and include in said transcript the following pleadings, proceedings and papers on file, to-wit:—

1. The style of this Court and cause.
2. Complaint.
3. Summons, with Marshal's return.
4. Demurrer.
5. Order overruling demurrer.
6. Answer.
7. Reply, (Amended).

7-a. Plaintiff's Exhibit "C."

7-b. Defts. Exhibits 1 & 2.

8. Motion for Judgment on Pleadings.

9. Order overruling Motion for Judgment on Pleadings.

9-a Judgment.

10. Bill of Exceptions (containing Findings, &c.)

11. Petition for Writ of Error. (Allowed in blank).

12. Assignment of Errors.

13. Bond.

14. Writ of Error.

15. Citation on Writ of Error.

16. Stipulation as to record.

17. Praecipe.

Kindly prepare said record and deliver the same to the printer, duly indexed, conformably to the stipulation hereto attached and made a part hereof, and with the rules of this Court and of said Circuit Court of Appeals, so as to have the same on file in the office of the Clerk of said Circuit Court at San Francisco, California, on or before the sixth day of March, 1915.

L. R. GILLETTE,
Attorney for Defendant and one of
Attorneys for Plaintiff in Error.

[Title of Court and Cause.]

Stipulation as to Record.

It is stipulated and agreed by and between the parties hereto and their respective counsel as follows:

I.

That in printing the record herein on writ of error to the U. S. Circuit Court of Appeals for the Ninth Circuit, that on all papers subsequent to the complaint, which bear the full title of the court and cause, such title may be omitted except as to the name of the paper or document, and there shall be inserted in lieu thereof the words "Title of the Court and Cause"; further, that in all instances subsequent to the pleadings and process, the endorsements on papers be omitted except the filing and the statement "Acknowledgment of due service attached"; further, that no pleading or paper be printed in the record more than once.

Dated at Fairbanks, Alaska, this 6th day of Jany, 1915.

G. B. ERWIN,
Attorney for Plaintiff,
L. R. GILLETTE,
Attorney for Defendant.

Due and legal service of the within and foregoing Praecipe and Stipulation by receipt of copy thereof, duly acknowledged at Fairbanks, Alaska, this 6th day of January, 1915, and plaintiff joins in the praecipe.

G. B. ERWIN,
Attorney for Plaintiff.

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div. Jan. 6, 1915. Angus McBride, Clerk.

[Title of Court and Cause.]

Complaint.

The plaintiff for a cause of action against the defendant, complains and alleges:

I.

That on or about the 26th day of May, 1910, and for a long time prior thereto, defendant above named owned and conducted a general merchandise store and business in the town of Rampart, Territory of Alaska, and was on said day the owner of a stock of dry-goods, groceries, provisions, etc. used by him in his said business.

II.

That on said 26th day of May, 1910, defendant sold to plaintiff his said stock of dry-goods, groceries, provisions, etc. and the good will of the said business for the consideration of about Eighteen hundred dollars ($1,800.00).

III.

That upon the payment of said sum, and in consideration thereof, the defendant executed and delivered to plaintiff his certain contract in writing, wherein it was provided as follows:

"I also hereby agree and promise not to engage in any way in the line of general merchandise for the next three years, that is up to May 26, 1913 inclusive, in the City of Rampart, Alaska, and should I do so, I hereby promise to forfeit the sum of Two Thousand Dollars. This last clause shall have no effect should the said Julius Rahmstorf discontinue business before May 26, 1913."

IV.

That on or about the ..... day of June, 1912, the defendant M. P. Fleischman, disregarding his said agreement with plaintiff, opened a general merchandise store as managing clerk of the Miners Store in said town of Rampart, Territory of Alaska, near plaintiff's place of business, and began to and now is conducting a like business to that referred to in said agreement in writing.

V.

That by reason of the premises plaintiff has suffered damages in the sum of Two thousand dollars, no part of which sum has been paid to plaintiff by defendant.

VI.

That plaintiff ever since said 26th day of May, 1910, has been and now is continuing in the said general merchandise business purchased by him from defendant in the town of Rampart.

WHEREFORE plaintiff demands judgment against defendant for the sum of Two Thousand Dollars as liquidated damages, and for his costs and disbursements of this action.

G. B. ERWIN,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,
Fourth Division.—ss.

Julius Rahmstorf, being first duly sworn, on oath deposes and says: That he is the plaintiff above named, that he has read the foregoing com-

plaint, understands the contents thereof and that he believes the same to be true.

JULIUS RAHMSTORF.

Subscribed and sworn to before me this 11th day of January, 1913.

(Seal) G. B. ERWIN,
A Notary Public in and for the
Territory of Alaska.

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div. Jan. 13, 1913. C C. Page, Clerk, by P. R. Wagner, Deputy.

[Title of Court and Cause.]

Summons.

The President of the United States of America, Greeting:

To the Above Named Defendant.

YOU ARE HEREBY REQUIRED to appear in the District Court, in and for the Territory of Alaska, Fourth Division, within thirty days after the day of service of this summons upon you, and answer the complaint of the above named plaintiff, a copy of which complaint is herewith delivered to you; and unless you so appear and answer, the plaintiff will take judgment against you for the sum of two thousand dollars ($2,000.00) and will apply to the Court for the relief demanded in said complaint.

WITNESS, the HONORABLE Frederic E. Fuller, Judge of said Court, this 13th day of January in

the year of our Lord one thousand nine hundred and thirteen.

C. C. PAGE,
Clerk.

By P. R. WAGNER,
Deputy Clerk.

I hereby appoint S. A. Yantiss a Special Officer to make service of this Summons.

H. K. LOVE,
United States Marshal.

Marshal's Return.

United States of America,
Territory of Alaska,
Fourth Division.—ss.

I HEREBY CERTIFY, That I received the foregoing Summons on the 27th day of January, 1913, and that I duly served the same on the therein named defendant M. P. Fleischman at Rampart on the 27th day of January, 1913, by delivering a copy thereof to him personally, together with a copy of the complaint prepared and certified by G. B. Erwin the plaintiff's attorney.

Marshal's Fees $6.00.

H. K. LOVE,
United States Marshal.

By S. A. YANTISS,
Special Officer.

(Indorsed) Filed Feb. 4th, 1913. C. C. Page, Clerk, By P. R. Wagner, Deputy Clerk.

[Title of Court and Cause.]

Answer.

Comes now the defendant, M. P. Fleischman and for answer to the complaint of Julius Rahmstorf on file herein, admits, denies and alleges as follows:

I.

Admits the allegations of paragraphs Nos. I and II of said complaint.

II.

For answer to paragraph No. III of said complaint, denies each and every allegation in said paragraph No. III contained and the whole thereof, except that defendant did on or about the first day of June, 1910, give to the plaintiff, at the plaintiff's request, a certain paper writing of which the seven lines quoted in said paragraph No. III is a part, as hereinafter alleged and not otherwise.

III.

For answer to paragraphs Nos. IV, V and VI of said complaint, denies each and every, all and singular, the allegations therein contained, and the whole thereof.

IV.

Denies each and every, all and singular, the allegations of said complaint and the whole thereof, except as hereinbefore specifically admitted.

And for a further separate and affirmative answer and defence to the complaint of the said Julius Rahmstorf on file herein, the defendant alleges:

said, the defendant, being without means or object in going to the States, decided to remain in said town of Rampart and there secure employment if possible; that on or about the 1st day of June, 1912, one F. J. Kalning opened a general merchandise store and business at said Rampart, and sought to employ the defendant as a clerk in the same; that defendant agreed to accept such employment provided the said Kalning would permit defendant to have the U. S. Post Office in said store and permit the defendant to conduct the same as postmaster, and to act as agent of the Victor Phonograph Co., outside his duties as such clerk; that the said Kalning agreed to such provision, and defendant accepted such clerkship at the wage of $75.00 per month and board and since such date has continued in the employ of said F. J. Kalning as such clerk and as postmaster at Rampart as aforesaid, and not otherwise, (all of which plaintiff has at all of said times well known).

V.

That the defendant has never, since the sale to plaintiff of the business aforesaid, resigned as postmaster at Rampart, nor has be opened up, owned or conducted, except as hereinbefore alleged, any merchandise business whatever at said Rampart, Alaska, nor has he as Clerk of the said F. J. Kalning aforesaid sought to alienate or divert merchandise trade from the said Julius Rahmstorf except through the sale of superior articles by the said F. J. Kalning had and kept for sale, and through

legitimate competition of said Kalning store.

VI.

That the said pretended agreement for the sale of the good will of said business, being so made separate and apart from the sale of said merchandise store and business, and for reasons appearing on the face thereof, is without sufficient consideration and void.

WHEREFORE, the defendant having fully answered, prays to be hence dismissed without day, and that he have judgment for his costs and disbursements in this behalf expended together with such other and further relief as to law and justice may appertain.

L. R. GILLETTE,
Attorney for Defendant.

United States of America,
Fourth Division,
Territory of Alaska.—ss.

M. P. Fleischman, being first dury sworn, on oath deposes and says: I am the defendant in the above entitled cause; I have read the foregoing answer, know the contents thereof, and the matters and things therein alleged are true as I verily believe, save as to those matters alleged on information and belief, and those I believe to be true.

M. P. FLEISCHMAN.

Subscribed and sworn to before me this 18th day of June, 1913.

(Seal) J. H. HUDGIN,
Commissioner and Ex-Officio Notary
Public in and for Alaska.

(Indorsed) Filed June 23, 1913. C. C. Page, Clerk, by P. R. Wagner, Deputy.

[Title of Court and Cause.]

Amended Reply.

Comes now the plaintiff Julius Rahmstorf, and for Reply to the further and separate answer and defense of the defendant served and filed herein, admits, denies and alleges as follows:

I.

Replying to paragraph I thereof he admits all the matters and allegations contained therein, with the exception of the matters contained and enclosed in brackets, which said matters are denied; and further answering said paragraph I plaintiff alleges that on or about the 26th day of May, 1910, the defendant came to plaintiff and as an inducement of entering into negotiations for the sale of his business to plaintiff, informed plaintiff that he would leave Alaska and go outside and stay there, and before leaving Alaska he would turn over to plaintiff the Post Office then being conducted by him as well as the agency of the North American Transportation & Trading Company then held by him.

II.

Plaintiff denies that at the time of the sale aforesaid the wife of defendant was in Rampart, and

alleges that the wife of defendant at said time was somewhere in the states and that she returned to Rampart during the late summer or fall of the year 1910; admits that the defendant was employed by him as salesman in said store and that defendant continued in said employ until February or March, 1911, and that during said time defendant continued as Post Master at Rampart and kept the Post Office in said store.

III.

Plaintiff admits that on the 26th day of May, 1910, (not on or about the 1st day of June, 1910 as alleged by defendant) that defendant duly executed and delivered to plaintiff the paper writing referred to in paragraph III of his further separate and affirmative answer and defense, a true copy of which is as follows:

"For and in consideration of the sum of One "Dollar to me in hand paid by Julius Rahmstorf "of Rampart, Alaska, I, M. P. Fleischman of Ram- "part, Alaska, hereby agree to the following:

"That should I resign my position as Postmaster "of Rampart, Alaska, I will do so in favor of Julius "Rahmstorf providing he be eligible at the time of "my resignation.

"I also hereby agree and promise not to engage "in any way in the line of general merchandise for "the next three years, that is up to May 26, 1913 "inclusive, in the City of Rampart, Alaska, and "should I do so, I hereby promise to forfeit the "sum of Two Thousand Dollars. This last clause

I.

That on or about the 26th day of May, 1910, and for a long time prior thereto, defendant was the owner of and conducted a general merchandise store and business in the town of Rampart, Territory of Alaska, and that on said day the defendant for a consideration of about the sum of Eighteen Hundred Dollars ($1,800.00) sold and delivered said merchandise store and business (not including the good will thereof, or the agency of the Victor Phonograph Co., which the defendant then had and still retains) including the stock of dry-goods, groceries, provisions, miners' supplies, etc., to the plaintiff Julius Rahmstorf.

II.

That at the time of the sale aforesaid the wife of defendant was seriously ill and defendant intended to take her to the States for treatment, but before such plan could be carried out the wife of defendant died; that for several months after the sale aforesaid, defendant at the request of plaintiff continued in charge of said merchandise store and business as managing clerk and salesman under pay of the plaintiff, to and until on or about the first day of September, 1910, and during all of said time defendant conducted the U. S. Post Office at Rampart in said store as Postmaster.

III.

That on or about the first day of June, 1910, the defendant gave to the said Rahmstorf a paper writing in words and figures in substance and effect,

as follows:

"For and in consideration of the sum of One Dollar, to me in hand paid by Julius Rahmstorf of Rampart Alaska, I, M. P. Fleischman of Rampart, Alaska, hereby agree to the following:

That should I at any time resign my position as Postmaster at Rampart, Alaska, I will do so in favor of the said Julius Rahmstorf providing he be eligible at the time of my resignation. I also hereby agree and promise not to engage in any way in the line of general mecrhandise for the next three years, that is, up to May 26, 1913, inclusive, in the City of Rampart, Alaska, and should I do so I hereby promise to forfeit the sum of Two Thousand Dollars. This last clause as to opening business shall have no effect, should the said Julius Rahmstorf discontinue business before May 26, 1913.

Signed in presence of

.....

.....

M. P. FLEISCHMAN."

That the defendant has a copy of said paper writing and the foregoing is a full, true and correct copy thereof to defendant's best knowledge and belief. That defendant signed said paper because of his intention to leave Alaska as aforesaid, and believing the same could not be enforced in any event.

IV.

That after the death of defendant's wife as afore-

"shall have no effect, should the said Julius Rahm-
"storf discontinue business before May 26, 1913.

(Sgd) M. P. FLEISCHMAN.

"Signed in the presence of

(Sgd) F. J. KALNING.

"Dated at Rampart, Alaska, May 26, 1910."

Further answering said paragraph III, plaintiff alleges that on said 26th day of May, 1910, this plaintiff paid to the defendant the purchase price of said stock of dry-goods, etc. agreed upon, and that said payment was the consideration received by the defendant for the sale of said merchandise store and business and the good will thereof and was the consideration for the defendant executing and delivering the agreement referred to; that plaintiff has no information and belief as to the intentions of the defendant, when he signed said paper, to leave Alaska, or as to the defendant believing the said agreement could not be enforced in any event, and therefore denies the same.

IV.

Plaintiff denies each and every allegation contained in paragraphs IV, V and VI of said further and separate answer and defense of the defendant.

WHEREFORE plaintiff asks for judgment as prayed for in his complaint.

G. B. ERWIN,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,
Fourth Division.—ss.

Julius Rahmstorf, being first duly sworn, on oath deposes and says: I am the plaintiff in the above entitled cause; I have read the foregoing reply, know the contents thereof, and that the same is true as I verily believe.

.....

Subscribed and sworn to before me this ..... day of ....., 1913.

.....

A Notary Public in and for the
Territory of Alaska,
My Commission expires:

(Acknowledgement of due service attached.)

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div. Nov. 1, 1913. Angus McBride, Clerk, By P. R. Wagner, Deputy.

Plaintiff's Exhibit "C."

DUPLICATE EXPENSE BILL

Pro. No. D 1630

Boat Susie Trip 6 Manifest No 50 Date 7-29-12

M. P. Fleischman To NORTHERN NAVIGATION COMPANY, Dr.

Destination Rampart .....Station Date.....190....

For Freight and Charges from Seattle

Marks	No. of Packages and Description of Articles	Feet	Weight	Rate	Amount	Charges Advanced	Lighterage	Total
I Stp	(2) Talk. Mach.	98						
1 Bx	" " Parts	135	233	79.80	9.30		25	9.55
						Total Collect		9.55

Consignor Sherman Clay & Co.

Received Above Freight in Good Order

Orig. Point and Date Ex Vict 41

M. P. Fleischman.

Per.....

vs. Rahnstorf

Plaintiff's Exhibit "C."

DUPLICATE EXPENSE BILL

Pro. No.....

Boat St. Michael Trip 5 Manifest No. 158 Date 7-21-12

To NORTHERN NAVIGATION COMPANY, Dr.

M. P. Fleischman .....Station Date.....190...

Destination Rampart For Freight and Charges from .....

Marks	No. of Packages and Description of Articles	Feet	Weight	Rate	Amount	Charges Advanced	Lighterage	Total
	1 Pk of Beef		228	12.00				1.37

Recd in good order

W. W. Crockett.

Fleischman

Plaintiff's Exhibit "C."

DUPLICATE EXPENSE BILL

Pro. No.....

Boat St. Michael Trip 6 Manifest No. 87 Date 8-3-12

To NORTHERN NAVIGATION COMPANY, Dr.

Fleischman .....Station Date.....190....

Destination Rampart For Freight and Charges from Circle.

Marks	No. of Packages and Description of Articles	Feet	Weight	Rate	Amount	Charges Advanced	Lighterage	Total
5 c	Eggs		290	22.80	3.31			3.31

Collect

Consignor N. C. Co. Received Above Freight in Good Order Flashman

Orig. Point and Date 8-3-12 Per John Wiehl

vs. Rahmstorf

Plaintiff's Exhibit "C."

NORTHERN NAVIGATION COMPANY.
RIVER—BILL OF LADING.

Shipped in apparent good order and condition by M. P. Fleischman on board the Northern Navigation Company's Steamer St. Michael (or any of the said Company's steamers, or steamers employed by them) whereof Looney is Master, now lying at the port of Rampart and bound for Dawson, the following described articles, contents and value unknown, to be transported to Victors Wood Camp and delivered in like good order and condition subject to conditions as printed on the back hereof, unto Frank Reinosky or to his or their assigns at Victors Wood Camp he or they paying charges for said freight at the rate on min per —— together with all such charges as shall have been advanced on same.

IN WITNESS WHEREOF, the Master, Clerk or Agent of said vessel hath affirmed to 3 Bills of Lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated at Rampart this 14 day of Sept—12.

Marks	Packages	Description of Articles	Weight subject to Correction	Feet
Address	14	Talking Machines	37	
	14	Records	18	
			$1.00 prepaid	

Triplicate.

Chas. Binkler.
Northern Navigation Company
per Julius Rahmstorf.

Accepted

M. P. Fleischman
J. R.
Shipper.

Triplicate.

Plaintiff's Exhibit "C."

DUPLICATE EXPENSE BILL

Pro. No.....

Boat Delta Trip 18 Manifest No. 181 Date 9-8-12

To NORTHERN NAVIGATION COMPANY, Dr.

M. P. Fleischman

Destination Rampart .....Station Date.....190....

For Freight and Charges from Dawson.

Marks	No. of Packages and Description of Articles	Feet	Weight	Rate	Amount	Charges Advanced	Lighterage	Total
	2 stps (3) Talk. Mach. 1 Bx Records	310	157.50	24.40		1.50		25.90

Collect

Received Above Freight in Good Order

M. P. Fleischman

Per F. Kalning

Consignor White Pass

Orig. Point and Date Dawson 9-8-12

(Indorsed) No. 1878. Plff's Ex. "C". Filed Jan 12, 1914. Angus McBride, Clerk, by P. R. Wagner, Deputy.

Defendant's Exhibit "1."

ORIGINAL EXPENSE BILL

Pro. No.....

Boat Susie Trip 1 Manifest No. 33 Date 6-1 1912

F. J. Kalning To NORTHERN NAVIGATION COMPANY, Dr.

Rampart Station Date 6-1-12

Destination Rampart For Freight and Charges from Tanana.

Marks	No. of Packages and Description of Articles	Feet	Weight	Rate	Amount	Charges Advanced	Lighterage	Total
No. 41	1 cs Catsup		58					
42	1 " Leaf Tobacco		58					
43	I Cad " "		29					
44	1 cs. Oysters		52					
45	1 " Asst Fruit		65					
46	1 " Pears		65					
47-48	2 " Peaches		130					
49	1 " Apricots		65					
50	1 c Baked Beans		60					
51	1 sk Rope		80					
52	1 cs Candy		103					
53-55	3 sks Rice		150					
56-57	2 sks Beans		100					
58-59	2 gns Beans		200					
60	1 Ble Salt		150					
61-72	12 Sks Sugar		600					
73-84	12 Gns Flour		1200					

85	1 Ble Ro Wheat		90				
86	1 " " Oats		90				
87-92	6 Sks Salt		300				
93	1 Bld Oars (6) pcs Strip		12				
94	1 cs Sweet Cresc.		52				
95	1 " Pilot Bread		58				
96	1 Cad Tobacco		13				
97-112	16 cs Groc Repack		1107				
113	1 Bdl Picks		28				
114	1 cs Vinegar		90				
115	1 " Gro Repack		29				
116	1 crt Ham		118				
120	1 cs Gro		57				
121-128	8 " "		416	12.—	33.75		
15	1 " Turks		61	18.—	.55		
117-118	2 " Eggs		110	14.40	.80		
119	1 Crt. Showcase		114	24.—	1.37		
			5910		36.47		36.47
						Collect	
		Total	5910		36.47		36.47

Consignor Rodman Alaska Trading Co.
Orig. Point and Date Tanana 6-1-12

Received Payment

Julius Rahmstorf.
Per.....

(Indorsed) No. 1878. Df's Ex. "1". Filed Jan 12, 1914. Angus McBride, Clerk by P. R. Wagner, Deputy.

Defendant's Exhibit "2."

ORIGINAL EXPENSE BILL

Pro. No.....

Boat Susie Trip 1 Manifest No. 28 Date 6-1-12

F. J. Kalning To NORTHERN NAVIGATION COMPANY, Dr.

Rampart Station Date 6-1-12

Destination Rampart For Freight and Charges from Tanana

Marks	No. of Packages and Description of Articles		Feet	Weight	Rate	Amount	Charges Advanced	Lighterage	Total
1 cs.	Crackers	No. 1		40					
1 "	Corn starch 2s	2		45					
2 "	Lard 3-4	3-4		130					
1 "	Cocoa 5s	5		15					
2 "	Bak Powder	6-7		40					
1 "	Mince Meat	8		27					
1 Bx	Evap Apples	9		57					
1 cs	Soups	10		49					
1 "	Raisins	11		38					
1 "	Roast Beef	12		27					
1 Crt	Bacon	14		145					
1 cs	Corn	13		27					
2 "	Tomatoes	16-17		130					
1 "	Stg Beans	18		45					
2 cs	Peas	19-20		90					
1 "	Sweet Potatoes	21		65					

2 " Corn	22-23	90
1 " Jelly	24	59
1 " Butter	25	72
2 " Ev Milk	26-27	126
1 " Nap Soap	28	83
1 Co Rope	29	58
1 Kg Nails	30	112
1 Bld Handles	31	21
2 " Shovels	32-33	60
6 cs. Carn Milk	34-39	390
1 " L. C. Syrup	40	72
1 " Repack Goods	No. 80	40
40		2153

—Over—

1 c Repack Groceries No. 129 40

Prepaid
on other ex bill

Collect.
Prepaid
12.91

Consignor Rodman Alaska Trading Co.
Orig. Point and Date Tanana 6-1-12

Received Payment Julius Rahmstorf
Per.....

(Indorsed) No. 1878. Def's Ex "2". Filed Jan 12, 1914. Angus McBride, Clerk by P. R. Wagner, Deputy.

[Title of Court and Cause.]

Demurrer & Motion for Judgment.

Comes now the defendant by L. R. Gillette, his attorney, and demurs to the reply of plaintiff to the answer on file herein, and for grounds of demurrer states:

I.

That the complaint herein as supplemented by said reply, does not state facts sufficient to constitute a cause of action or to entitle plaintiff to the relief demanded.

II.

That the court has no jurisdiction of the person of defendant or of the subject of the action.

III.

That the reply herein admits that the agreement sued upon is that set out in the affirmative answer of the defendant (save as to date thereof) and said agreement is void and of no effect because:

a. It is without subject matter;
b. It is without consideration;
c. It is against public policy.

WHEREFORE, the premises considered, the defendant moves for judgment upon the pleadings for the dismissal of the action, and for his costs and disbursements herein.

L. R. GILLETTE,
Attorney for Defendant.

(Acknowledgment of due service attached.)

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div. Nov 3, 1913. Angus McBride, Clerk.

[Title of Court and Cause.]

Order Overruling Demurrer and Denying Motion for Judgment on Pleadings.

This matter having come on regularly for hearing upon defendant's demurrer to plaintiff's reply, and motion for judgment upon the pleadings, and having been submitted upon briefs of counsel, and the same having been duly considered,

IT IS ORDERED that the said demurrer be overruled and said motion denied.

Dated: December 8, 1913.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 12 page 789.

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div. Dec 8, 1913. Angus McBride, Clerk, by P. R. Wagner, Deputy.

[Title of Court and Cause.]

Judgment.

This cause having come on regularly for trial before the Court on the 12th day of January, 1914, the plaintiff appearing in person and by Guy B. Erwin, his attorney, and defendant appearing in person and by his attorney, L. R. Gillette, both parties in open court waiving trial by jury; and the court having heard and considered the evidence and proofs offered on behalf of the parties respectively, and the arguments and briefs of counsel, and having fully considered the same, and having heretofore made and signed its findings of fact and

conclusions of law in the premises and being now fully advised in the premises, NOW THEREFORE,

IT IS HEREBY CONSIDERED, ORDERED AND ADJUDGED that the plaintiff Julius Rahmstorf do have and recover of the defendant, M. P. Fleischman, the sum of Two Thousand Dollars ($2,000) damages, together with his costs and disbursements taxed at $18.35, and that the plaintiff have execution therefor.

Done in open Court this 9th day of March, 1914.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 12 page 874.

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div. March 9, 1914. Angus McBride, Clerk, by P. R. Wagner, Deputy.

[Title of Court and Cause.]

General October 1913 Term. Saturday, March 7, 1914.

One hundred fourth Court Day.

Order Denying Motion for New Trial.

Now on this day, the motion of defendant for a new trial herein having heretofore been submitted to the Court for its decision, G. B. Erwin appearing in behalf of plaintiff and L. R. Gillette appearing in behalf of defendant; the Court being duly and fully advised in the premises,

IT IS ORDERED that the said motion be, and the same is hereby denied, and defendant is granted sixty (60) days within which to perfect an appeal of said cause.

Entered in Court Journal No. 12 page 873.

F. E. FULLER,
District Judge.

[Title of Court and Cause.]

Bill of Exceptions.

AND BE IT FURTHER REMEMBERED that thereafter and on the 12th day of January, 1914 at 10 o'clock A. M., said action came on regularly for trial before the above entitled court, a jury having been expressly waived by the parties; Guy B. Erwin, Esq., appearing as attorney for plaintiff and L. R. Gillette Esq., appearing as attorney for the defendant, whereupon the following testimony and evidence was taken and given and the following proceedings were had, to-wit:

Julius Rahmstorf, the plaintiff, being first duly sworn as a witness in his own behalf:

(By Mr. Gillette).

At this time we object to the taking of any evidence on behalf of the plaintiff under the allegations of the complaint and reply in this action, on the ground that the same are insufficient in law to entitle the plaintiff to the relief demanded or any relief, or to constitute a cause of action against the defendant.

(The Court).

The objection will be overruled. Exception.

WHEREUPON the trial proceeded, and witness Rahmstorf testified as follows:

DIRECT EXAMINATION.

(By Mr. Erwin).

My name is Julius Rahmstorf and I am plaintiff in this action. I reside at Rampart Alaska where I have been conducting a mercantile business since June 1899; I have known the defendant M. P. Fleischman since about 1899, at which time he was conducting a restaurant with a little merchandise counter at Rampart, and was also postmaster there —had no other business except mining; about May 1910 he was conducting a general merchandising store at Rampart.

About May 1910 I had some negotiations with defendant Fleischman. He appeared several times prior to that date in my store and made me a proposition to take over his general merchandise, stating he was going to leave the country if I was willing to buy him out. I at first refused, the conditions at Rampart not being very good. But he came around again and made me the further inducement that he was going to turn the post office over to me, provided I would be appointed of course, and also the agency of the N. A. T. & T. Company. So I considered it, and finally agreed to buy him out. It is impossible for me to state the exact date of this agreement, it may have been in April—it was prior to May. We agreed upon the amount—prices at which the goods should be taken over. I also told him, outside of the store building, in a case like this, he would have to make a contract that he was going to leave the country, or that he was not going

to conduct any business; which, of course, he said it was thoroughly understood that he was going to leave Alaska anyway. We then, on May 19th, commenced moving his stock to the building which I now occupy—I rented in the meantime from him—belonging to the N. A. T. & T. Company. He moved his stock in there any invoiced it, and ascertained the prices as near as we could, which occupied several days. Then on May 26th—I already told him before that I was willing to settle with him, to pay the purchase price—on May 26th I told him to have this agreement which we made before—

(Mr. Gillette): I object to that as not the best evidence—the agreement is in writing and they must produce it. (Objection overruled—exception.)

He then retired to the corner which he used as a postoffice in my own place, and on his own typewriter he drew up the agreement, and signed it, and witnessed it by F. J. Kalning.

After he handed me the signed agreement, I paid him the price of eighteen or nineteen hundred dollars—I dont remember exactly how much,—which closed the whole transaction. I have the original of that agreement in my possession.

(Mr. Erwin): I ask that this be admitted in evidence.

(Mr. Gillette): We object to that being received in evidence on the ground that it is irrelevant, incompetent and immaterial. It is not sufficient in law as a basis of an action of this kind. The pleadings show that it was not incident to the sale of

the business, but incident to the contract over the post-office—a separate agreement from the sale altogether, as testified to by this witness.

(The Court): I don't understand the testimony. (Objection overruled—exception. Whereupon said contract was received in evidence, marked Plaintiff's Exhibit A, and read into the record as follows):

"For and in consideration of the sum of one dollar to me in hand paid by Julius Rahmstorf, of Rampart, Alaska, I, M. P. Fleischman hereby agree as follows: That should I resign my position as postmaster of Rampart, Alaska, I will do so in favor of Julius Rahmstorf, provided he be eligible at the time of my resignation. I also hereby agree and promise not to engage in any way in the line of general merchandise for the next three years, that is, up to May 26, 1913, inclusive, in the city of Rampart, Alaska; and, should I do so, I hereby promise to forfeit the sum of two thousand dollars. This last clause shall have no effect should said Julius Rahmstorf discontinue business before May 26, 1913.

M. P. FLEISCHMAN.

Signed in the presence of

F. J. KALNING.

Dated at Rampart, Alaska, May 26, 1910."

I paid over some money after I had received this contract, and received from defendant a receipt for same. I got that receipt on the date it bears.

(Mr. Erwin): I now offer the receipt in evidence.

(Mr. Gillette): We object to it as irrelevant, incompetent and immaterial for the reasons heretofore stated. The contract is not one on its face that is enforceable. (Objection overruled—exception. The receipt was then received in evidence and marked Plaintiff's Exhibit B, and was read into the record as follows):

"Rampart Alaska, 5-26-10. Received from Julius Rahmstorf seventeen hundred ninety-one 15-100 Dollars ($1791.15) for a stock of merchandise, as payment in full.

M. P. FLEISCHMAN."

Across one end of the check, in printing is "Julius Rahmstorf Rampart, Alaska."

The stock of goods that I bought at that time consisted of a little of everything the line of general merchandise as needed in a mining camp, such as groceries, hardware, dry-goods, shoes, talking-machines—one or two,—one I guess, and some lumber. I still continue in business at Rampart, and have so continued without interruption since 1899.

Up until January 1, 1912 the defendant Fleischman had conducted his post-office in my store, and also had a home for his private use from me. All at once he concluded to move out of my place. His wife got sick. I believe for that reason he stated it was too cold; and he moved her to his own place in which he had a half interest, in Rampart, and was there before conducting his business, his store, also. He did not have a store there at that time. Soon after his wife did die, he commenced fixing the

place up, replacing shelves, counters, etc. Then, about the latter part of May, when the navigation opened, he went down to Tanana and did purchase a small stock of groceries from one W. B. Rodman. Those goods were landed in this house before mentioned, and it was opened up for his business, and he conducted and managed his business,—I judge this was in June 1912,—a general store, but in the main part it consisted of groceries only. I dont know that he had a man employed in this place, but there were friends around who assisted him. F. J. Kalning was around there. The store was named "The Miner's Store, and it is in existence today and has been running ever since June, 1912. They keep for sale general merchandise such as groceries, hardware, dry-goods etc., a similar stock to that which I handle.

Q. Have you been damaged by the fact that this store was opened up there?

(Mr. Gillette): We object to that as irrelevant, incompetent, immaterial, and calling for a conclusion of the witness. Let him state the facts.

Objection overruled. Defendant excepts.

I have been damaged—the sales decreased quite heavy, at least fifty per cent. I lost a good many customers. Fleischman the defendant is managing that store. Up until the fall I believe in 1912—I am not sure whether it was 1912 or 1913—F. J. Kalning was engaged in mining on Little Minook creek, and only was in the store on Sundays, and that time when Fleischman went down to Tanana

he was there probably for a week. But since the fall of 1912 he is there every day I should judge. I have seen him (Kalning) chopping wood, carrying water, delivering goods, and doing all sorts of work outside of the house.

CROSS EXAMINATION.

(By Mr. Gillette.)

It was about June 1st, 1912 that Fleischman bought the stock of goods. Those expense bills dated June 1, 1912 shown me by counsel, are the expense bills for that shipment of goods, are signed by me, and I received the money on them.

A year ago this winter especially, I did considerable business with the Miner's Store; Kalning went in that store to work in the fall of 1912 after the mining season closed. Fleischman claims Kalning owns the business known as the Miner's Store—Kalning never told me that he did and I never considered that he did. Those expense bills exhibited by counsel are made out by me—signed by me, and Kalning insisted that they be made out in his name always, as well as Fleischman at times.

Fleischman did always the business; from Kalning's actions he never did any business there at all so far as I am concerned, still he insisted that I should make out the bills to him and I did so. I made no objection, He might give me another name and I would make the bill out in another name. I cannot swear that Fleischman owns that business.

I never made out a bill in my life since the Miner's Store has been running, against Fleischman, except in some other connection, that I remember of. I have been in the Miner's Store occasionally to get my mail—I generally send somebody for it. The post-office is conducted by Fleischman in the back of the Miner's Store.

I have been damaged to a far greater extent than the sum stipulated in the agreement, through loss of trade. I never knew of Fleischman taking away any of my customers in a direct way. My complaint is that that store, to which I rendered bills as The Miners Store, has entered into competition with me and got a part of the trade in Rampart.

Q. You thought for a time you had everybody else shut out, did'nt you?

A. I did'nt think anything of the kind. If the N. C. would start to close up, and that would leave me alone, maybe another one would start up a store. If somebody else had entered into competition with me besided Kalning, they would have undoubtedly got part of the trade too.

As to just the date when the sale took place, as I recollect Fleischman commenced moving his stock on the 19th of May 1910; it took probably two or three days to move them. They were moved on the 19th, 20th and 21st of May; it is a question whether they were my goods as soon as they were moved into my store. In my opinion they were not until I paid for them. After they were moved there was a little lapse that we did'nt do anything. It took

several days to go over them and ascertain the prices and figure them up.

I was supposed to get most of the goods at actual cost price, in which was included freight. There were other goods which were considered dead stock that I got at greatly reduced prices—such as hardware and dry-goods.

After I bought the Fleischman stock I hired him as clerk in my store; he worked for me until about November on a salary, and then got a spell and quit; then he started in again and that lasted until about February 1911 when he quit and stayed quit. I paid him his money and that was the end of it. I paid him a salary—I am not positive how much. He made me the same proposition—this proposition—stated that the Government gave him a certain amount for the post-office and if I would give him so much more, he would help me in the store—it was either seventy or seventy-five dollars.

Q. Did'nt Fleischman (about February 1911) criticise you for the way you ran your business?

A. He might have. I certainly criticized him in return.

Q. You have been criticizing him ever since, have'nt you?

A. I certainly do criticize him any time I have a chance to talk about him.

When Fleischman was working for me, it was understood from the beginning that he was not going to carry the water and cut the wood, and I

said I did'nt want him to do it. He had to attend to the post-office—I had nothing to do with that whatever.

RE-DIRECT EXAMINATION.

(By Mr. Erwin): I am the agent of the Northern Navigation Company at Rampart. The duplicate epense bills from the Northern Navigation Co. handed me by counsel are made out in the name of M. P. Fleischman, Rampart Alaska. This additional paper handed me by counsel is a bill of lading issued by me as agent of the Northern Navigation Co. covering a shipment of talking machines and records. The expense bills cover (1) Str. "Delta" covering a shipment of talking machines and records; (2) Str. "Susie" also covering shipment of talking machines and parts; (3) Str. "St. Michael" covering a shipment of 5 cases of eggs from Circle, Alaska; (4) Str. "St. Michael" covering a quarter of beef from Gibbon I presume—it is left out. (Papers admitted and marked Plaintiff's Exhibit C.)

As to date when the sale of Fleischman's stock of goods was completed, I did not consider it completed until I paid over the money on May 26th. (Defendant moves to strike the answer as not responsive—overruled, exception.)

Q. Were the terms of this agreement, Plaintiff's Exhibit "A" discussed during the transaction?

(Mr. Gillette): We object as irrelevant, incompetent and immaterial. The agreement is in writing, and not ambiguous on its face. Objection overruled—exception.

A. They were thoroughly discussed by me outside of the building leaning on the fence before I entered into any agreement—before I entered into the agreement to take over the stock, and previous to the moving of the goods to my store.

RE-CROSS EXAMINATION.

(By Mr. Gillette.)

The inventory as it was made up did not include an agency for talking machines. I collected the freight and delivered the goods represented by the expense bills in evidence, and while I bought one or two talking machines from Fleischman I did'nt know that he had the agency for them until some time afterwards. I dont know whether corrected expense bills were afterwards made out to F. J. Kalning for the items in evidence in the name of Fleischman.

M. P. FLEISCHMAN, witness called on behalf of plaintiff and first duly sworn, testified on

DIRECT EXAMINATION.

(By Mr. Erwin.)

My name is M. P. Fleischman, I am defendant in this action and have resided at Rampart Alaska since the spring of 1898. I now have the postoffice at Rampart and am clerking for F. J. Kalning; have been clerking for him since June 1, 1912—goods are billed sometimes to "F. J. Kalning" and sometimes the "Miner's Store,"—it is known as the Miner's Store. I have been employed in Kalning's store continuously since June 1, 1912 until May 26, 1913 and after.

CROSS EXAMINATION.

(By Mr. Gillette.)

Kalning pays me $75.00 a month and board; both of us keep the books. The book handed me by counsel is Kalning's blotter cash book.

Q. I will ask you to look on the second page under June 30th there, and see what the second entry there under June 30th, I think it is, there?

(Mr. Erwin): I object, as not proper cross-examination.

(Objection sustained. Defendant excepts.)

Motion of plaintiff for judgment on the pleadings and on the case as presented, denied.

PLAINTIFF RESTS.

(Mr. Gillette): We now move for judgment on the pleadings and the evidence, on the ground that the plaintiff has entirely failed to prove his case, for the reason (1) the evidence of plaintiff shows that the agreement, Plaintiff's Exhibit A was induced by the proviso therein as to the postoffice at Rampart Alaska and the promise of the agency of the N. A. T. & T. Company, and not by the sale of the Fleischman stock of merchandise; (2), further that the contract for the purchase of the Fleischman stock was consummated some time in April, 1910 but before May 1910, and the said agreement of May 26, 1910 was therefore separate and apart from said sale and on a separate consideration; (3) that even if said agreement of May 26, 1910 be considered valid and binding, the evidence fails to show that the defendant has violated the same, and

(4) while plaintiff testifies he has been damaged in his business from June 1, 1912 to May 26, 1913 for more than the amount specified in said agreement of may 26, 1910 there is no evidence to show of what such damage consists, or what amount of business the plaintiff did prior and subsequent to said alleged breach, or that any loss of business claimed was attibutable to the acts of the defendant.

(The Court): (After argument.) I will deny the motion now, and you may renew it at the close of the case. Defendant excepts.

DEFENSE.

JULIUS RAHMSTORF called as a witness for defendant and theretofore duly sworn, testified on

DIRECT EXAMINATION.

(By Mr. Gillette.)

I should judge I did about $20,000 general merchandise business in the year 1912, (1911) and paid $50.00 license, as far as I remember in 1912—the record will show.

Q. What merchandise license did you pay for the year 1912?

(Mr. Erwin): Objected to as irrelevant and immaterial.

(The Court): Sustained. He is not being tried for failure to pay a proper license fee.

(Mr. Gillette): That is true, but he alleges that he lost so much money in a certain number of months in the way of damages, and have'nt I a

right to show by his testimony that he paid only a license on less than $10,000 merchandise.

(The Court): I think that is a collateral matter. He is not up here for cross-examination now.

(Mr. Gillette): Cannot a defendant (party) himself be called to rebut his own testimony in chief?

(The Court): Certainly. But he is then made a witness for the party who calls him, and the examination has to proceed the same. If he is a hostile witness, you can put leading questions.

(Mr. Gillette): We except. I will withdraw this witness and call the clerk.

(The Court): I cannot see that it is competent testimony in any phase of the case. It might be, on cross-examination of Mr. Rahmstorf, to discredit his testimony. But the fact that he did'nt pay a certain amount of license fee is not evidence that he did'nt do a certain amount of business.

(Mr. Gillette): This is a damage suit,—

(The Court): It is an action for damages, and the damages are fixed by the terms of the contract.

(Mr. Gillette): Does the Court hold that the plaintiff must not show damages, even under that contract?

(The Court): I think, if plaintiff is entitled to damages, that they are fixed by that contract.

(Mr. Gillette): We except. I will call the clerk.

PAUL R. WAGNER, witness called on behalf of defendant and first duly sworn testified on

DIRECT EXAMINATION.

(By Mr. Gillette.)

My name is Paul R. Wagner; I am deputy clerk of this court, and as such have the custody of the records respecting the payment of merchandise licenses.

As such officer I have in my possession and custody a merchandise license of F. J. Kalning beginning June 1st, 1912 and also for the year 1913.

— —·— — — — —

The defendant then offered to prove that F. J. Kalning applied for and obtained merchandise license under the laws of Alaska beginning June 1st, 1912 for 1912 and also for 1913 and up to the date of the trial for his store at Rampart, which offer was denied and defendant excepted.

The defendant then offered in evidence the merchandise license applications of Julius Rahmstorf for his store at Rampart Alaska for the years beginning August 27, 1911 and August 27, 1912, in which Rahmstorf swears in both instances that he is doing a business at Rampart of over $10,000 and less than $20,000, and for which he paid both years $50.00 to the Clerk of the District Court under the law, which offer was by the Court denied, and defendant excepted.

M. P. FLEISCHMAN, defendant being called as a witness in his own behalf and first duly sworn, testified on.

DIRECT EXAMINATION.

(By Mr. Gillette.)

My name is M. P. Fleischman, I am defendant in this action, have resided at Rampart Alaska since the spring of 1898 and up to about May 20th, 1910 there conducted the postoffice and a general merchandise store. After May 20th, 1910 I started clerking for Julius Rahmstorf beginning the 26th, and clerked for him four or five or six months, after which I had just the postoffice up to June 1, 1912. In the summer of 1911 I had the postoffice and took a trip to the Iditarod where I was interested in mining; on returning I lived with my wife at Rampart until she died January 30th, 1912. Between February and June 1, 1912 I was doing nothing except run the postoffice.

I sold out my merchandise stock in 1910 to Julius Rahmstorf.

In connection with that stock of goods I had the agency for the Victor Phonograph and for the North American Transportation and Trading Co, neither of which agencies were conveyed with said stock of goods. As soon as I sold to Rahmstorf about May 20th, 1910 we started to take inventory and move the stock about May 21st, the day the sale was made.

Q. After the 21st day of May, 1910 whose stock of goods was that?

(Mr. Erwin): We object to that as incompetent, irrelevant and immaterial, depending upon a conclusion of the witness.

Objection sustained. Defendant excepts.

We finished taking inventory about May 25th,

1910; the inventory was being taken as the goods were moved. I was paid for the stock on the basis of what the inventory figured up. The sale to Rahmstorf included the general merchandise that was in my store. I worked for Rahmstorf on a salary, as a clerk, had the use of a home next to the store, and room for my postoffice in his store. During that time I still acted as agent for the North American Trading & Transportation Co., and collected rent from Rahmstorf for his store building on behalf of that corporation; I continued as agent for said corporation until about a year ago. I started to collect rent from Rahmstorf on May 26th, 1910, on which date I think we finished the inventory and figured up what was coming to me on the stock of goods sold to Rahmstorf.

I signed the contract in evidence as Plaintiff's Exhibit A.

Q. State the circumstances under which you signed that and for what purpose?

(Mr. Erwin): Objected to—it shows on its face what the purpose was.

(The Court): Sustained as to that part of the question. Defendant excepts.

Mr. Rahmstorf asked me on the 26th of May, or after that—I dont remember just when it was—if I would have any objection to making such an agreement. I told him no; that I did'nt think I would ever go into business again, I figured on going outside. But my wife took sick and died, and on that account I remained in the country. After we

had that talk I signed the agreement—on or after the 26th of May, 1910. After the sale to Rahmstorf I never opened up any business in Rampart—have been clerking for F. J. Kalning.

I purchased the goods represented by expense bills defendant's Exhibits 1 and 2 of Rodman, for F. J. Kalning. Kalning sent me down to get them, and he paid for them. Kalning opened up his store in Rampart Alaska, June 1, 1912 in the building where I kept the post-office, and has continued and is continuing said business ever since. I am working for him as clerk on a salary, with the privilege of living in the building. In addition to my salary I have what is coming to me from the post-office.

The book handed me by counsel is the blotter cash book of F. J. Kalning, Rampart store. It is kept partly by myself and partly by Kalning—we both make entries in it, and that book is kept in the ordinary course of business. .....

Defendant offers in evidence the monthly entries in said book covering salary of M. P. Fleischman—objection to same as incompetent sustained. Defendant excepts.

My salary is paid me monthly in cash or gold-dust, and an entry made of the same as of that day's proceedings.

I secured corrected expense bills in the name of F. J. Kalning for those offered by the plaintiff made out in my name, they were so made at my request; except for the talking machines which was

my own business.

In the conduct of that business (Miner's Store or F. J. Kalning) over there, I never endeavored to draw off any of the trade or customers of Julius Rahmstorf. The Kalning store, during especially the first year of its existence, did business with the Rahmstorf store in the name of the Kalning or Miner's store.

(Mr. Gillette): The suit was brought January 11, 1913 and we will show—we offer to show by this witness that Kalning's store did several thousand dollars worth of business with the Rahmstorf store to about that time, and afer that that they have not done very much.

Objected to—objection sustained. Defendant excepts.

The circumstances with reference to my signing the contract Plaintiff's Exhibit A were: I think it was the 26th of May. Not before this; it might have been after, after the goods were all sold to Mr. Rahmstorf. Mr. Rahmstorf asked me if I would have any objection to giving him an agreement that I would not enter into business any more for three years. I told him "No; I will give you that agreement. I am not going in business any more." This was all done in the store. There was nothing ever spoken about an agreement before the 26th of May. It was made up after the 26th, after the goods were sold and in Mr. Rahmstorf's possession. I wrote the agreement, and Mr. Rahmstorf read it before I signed it. Before the agree-

ment was written out we had a conversation about the post-office. Mr. Rahmstorf was at that time postmaster at Eureka, and I agreed if I should ever leave the town of Rampart, that if he were elegible for that position of course that would be up to the Department to appoint him or not as they felt about it. I would recommend him, or turn the postoffice over to him. In other words, he wanted to keep the postoffice in his store; I would consider the postffice at Rampart a drawing card in the mercantile business.

At the time I signed the contract I intended to go outside with my wife; she died January 30, 1912. I have never resigned as postmaster at Rampart. I have never since the 26th day of May, 1910, owned or conducted, except as a clerk for hire, any mercantile business whatever in Rampart. I do not think of anything else that I have not testified to, that is material to the case.

CROSS EXAMINATION.

(By Mr. Erwin.)

My wife was outside at the time this agreement was entered into, but she was to come back that summer. I wrote that agreement (Plaintiff's Exhibit A) on the typewriter, with Mr. Rahmstorf's assistance. When I sold to Rahmstorf one talking machine was included in the sale, and I think I said something to him about retaining the agency for talking machines although I am not clear on that. I did'nt put it in the agreement because I could not sell an agency. I did no talking machine

business while in Rahmstorf's store.

I have stated in my answer that I did not believe that contract could be enforced in any event, but if I had read the answer over more carefully I would not have allowed that sentence to be in the answer. The answer was sent to me at Rampart to be verified and I crossed out parts of it and left that sentence in; but it was all done in a hurry—I had to get it off in the mail that left the same day it was received. I signed the verification and swore to it before U. S. Commissioner Hudgin. At the time I signed the agreement, I never thought of the question whether it could be enforced or not.

I kept a very accurate system of books and papers for F. J. Kalning while I was clerking for him. I was careful that any little item billed to myself was corrected in each case, because I had heard that Mr. Rahmstorf threatened to bring suit against me. I was careful that no article should be charged to me, except perhaps talking machines.

Sometimes I ordered the goods for Kalning's store, and sometimes he did; I did some of the corresponding and Kalning did some; I signed Kalning's name to the correspondence, by myself when I did the writing.

I did not open up any business at Rampart; I went to Tanana and ordered the goods—Kalning was not along. Kalning was in Rampart when the store was opened, and remained there a few days and went to the creeks; he was then back and forth probably once a week, or once in two weeks. He

took part in running the store during that time—looked over the books and would attend to any customer who would come in while he was there. I had full supervisin of the store when he was not there, as clerk.

The building in which Kalning's store is situated is the postoffice building, of which I am half owner and Dr. Hudgin is half owner. I have charged up rent of that store for Dr. Hudgin's half, and still charge it. Kalning and myself kept the books. I did not generally supervise the ordering of goods; sometimes I ordered them and sometimes Kalning did, and I sold goods out of the store for Kalning. I was not the only one who transacted business for Kalning in his absence; there would be other people in the store who would wait on customers, and they would have the care and custody of the business while they were there. I had the care, custody and management of the store only as clerk; I took care of the business in Kalning's absence the same as I did when I was clerking for Rahmstorf.

I had conducted a merchandise business at Rampart for many years prior to selling to Rahmstorf; the Miner's Store is about 500 feet from where Rahmstorf keeps his store. I am selling in the Miners Store the same kind of goods Rahmstorf is selling, except liquors.

RE-DIRECT EXAMINATION.

(By Mr. Gillette.)

At the time I signed that contract I did not

think Rahmstorf could compel me to turn the post-office over to him. Either Kalning or myself collect for the Miner's Store, depending on which is there at the time.

Kalning ceased active mining operations some time in September, 1912, after which he let them out on a lease, and has been actively engaged in running the store practically all the time since. Bills due the store are never made out in my favor; the accounts run to the Miner's Store as a rule, sometimes F. J. Kalning.

Q. I will ask you to state whether your acts, in your working for the Kalning store as you have testified, ever in any manner damaged the plaintiff in this action?

(Mr. Erwin): We object to that as calling for a conclusion of the witness, which is a matter for the court to determine.

Objection sustained. Defendant excepts.

I have always heard indirectly that Rahmstorf was complaining about my connection with the store, ever since Kalning opened it up; he never complained to me personally.

RE-CROSS EXAMINATION.

(By Mr. Erwin):

It all depends on the season, whether the Miner's Store enjoys a good business or not.

W .B. BALLOU, called as witness for defendant, being first duly sworn testiifed on

DIRECT EXAMINATION

(By Mr. Gillette.)

My name is W. B. Ballou; I live at Rampart, have lived there since 1898; I know Julius Rahmstorf, M. P. Fleischman and F. J. Kalning since they have been in Rampart. I am by occupation a miner, am mining on Hunter Creek. F. J. Kalning is in the mercantile business at Rampart, having his store in the postoffice building where Mr. Fleischman is postmaster—it is known as the Miner's Store. I trade both at that store and at Julius Rahmstorf's. Kalning started in the mercantile business two years ago in the summer sometime.

Q. Did Mr. Fleischman ever try to prevent you from trading at Rahmstorf's?

(Mr. Erwin): Objected to as incompetent and irrelevant.

(The Court): There has been no evidence that he has been doing that.

Objection sustained. Defendant excepts.

CROSS EXAMINATION.

(By Mr. Erwin.)

When the people of Rampart refer to this store, I have always heard it referred to as the Miner's Store; often we say "up at Fleischman's." When trading with that store I did business with both Fleischman and Kalning, whoever was there—whichever I dealt with fixed the prices; whoever I was dealing with told me what the prices of the goods were. I dont think there was ever any discussion when the matter of prices was put up from one of them to the other.

JOHN W. DUNCAN, witness called on behalf

of defendant and first duly sworn testified on

DIRECT EXAMINATION.

(By Mr. Gillette.)

I have lived in Rampart fourteen years and know F. J. Kalning. (Letter from Mr. Marion, Tanana Alaska, to witness exhibited by counsel and objected to)

(Mr. Gillette): I have not offered it yet. I doubt that it is material, although it might be on the question of damages, but as the court does not consider that that enters into the matter, I will not —(interrupted)

(Mr. Erwin): I cannot see how that letter from Marion to this man could be material.

(Mr. Gillette): It might show how Rahmstorf stood among business men.

(The Court): I do not think that is a proper way to show it, although I dont know what the letter refers to.

I do most of my dealing in Rampart with the Miner's Store—just little odds and ends—I get my outfit from the outside. I have not dealt with Rahmstorf in the last year, but did prior to that. In the last year I have been against Rahmstorf's liquor license, but that is the only difference of opinion we have had. Fleischman never tried to get me to quit trading with Rahmstorf. I was in Rampart when the Kalning store was opened up, but know nothing of the private business of Kalning.

CROSS EXAMINATION.

(By Mr. Erwin.)

By the people at Rampart and myself, the Miner's Store is generally referred to as the postoffice; the telephone call is the postoffice. We call the store the postoffice—"Where are you going?" "I am going to the postoffice,"—that means the Miner's Store. I cant say whether they ever say "Fleischman's store," but I know it is referred to as the postoffice.

DEFENDANT RESTS.

JULIUS RAHMSTORF called in rebuttal testified on

DIRECT EXAMINATION.

(By Mr. Erwin.)

I have had telephone communications with Fleischman as to orders for goods from me, or when I was buying from him—with reference to all sorts of groceries—staple articles, in regard to quantities or prices.

Q. What conversation would you have with him over prices for instance?

(Mr. Gillette): We object as incompetent and immaterial.

Objection overruled. Exception.

He always took the lead in accepting prices, and he accepted it or declined it without consulting Kalning in any way. At other times he sent Kalning over with a order written in his own handwriting, as a rule, to get certain articles. When the articles were not on hand or the prices not right, Kalning went back at times to consult Fleischman whether to bring it or not; and on several occasions he also

talked with him over the 'phone, from my store, to get his permission, or his view, or idea. He was putting the matter up to Fleischman for his opinion.

CROSS EXAMINATION.

(By Mr. Gillette.)

I do not remember that Fleischman has ever consulted Kalning. I do not know that Kalning was talking with Fleischman over the phone, but he rang up and there is no other one in the store—I must infer that Fleischman is on the other end of the line—it might undoubtedly have been somebody else.

(Mr. Erwin): If the Court please, I would like to amend my complaint to conform to the proofs in this case. I ask to amend paragraph 4 thereof, by inserting in that paragraph at the end, "as managing clerk of the Miners Store at Rampart."

(Mr. Gillette): We object to that. It changes the whole nature of their case. They come in here and alleged that defendant has opened up a general merchandise store in the town of Rampart in plaintiff's place of business, and began to and now is conducting a like business to that referred to in said agreement in writing. If he changes the character of the employment—that may be permitted in an equity case, but in a law case I think it is never permitted, except where it does not change the issues.

(The Court): I do not see that it would particularly change the issues here. . . . I dont see that the defendant's testimony would have been any

different. . . . . The amendment may be made and the clerk may make the amendment.

Defendant allowed an exception.

PLAINTIFF RESTS.

(Mr. Gillette): Before the argument proceeds, I wish to renew the motion made at the close of plaintiff's case in chief, although I think a demurrer to the evidence is obsolete in our practice.

Motion overruled. Exception.

Whereupon said action was submitted to the court upon arguments and briefs of the respective counsel be be presented at a later date.

AND BE IT FURTHER REMEMBERED that thereafter, and within the time allowed by law the defendant presented to the court special findings verdict and judgment in said action based upon the pleadings and testimony and evidence in said matter, in words and figures as follows:

[Title of Court and Cause.]

Defendants Proposed Findings & Conclusions.

(Comes now the defendant, and moves the court to make and enter the following findings of fact and conclusions of law herein:)

"This matter having come on regularly for trial before the above entitled court on the 12th day of January, 1914, Guy B. Erwin Esq., appearing for plaintiff and L. R. Gillette Esq., appearing for the defendant, and the defendant objecting to the taking of testimony on behalf of the plaintiff or at all on the grounds and for the reason heretofore urged to the complaint and said reply, said objection

is overruled, to which ruling of the court defendant excepts and exception is allowed; thereupon, the parties respectively waiving a jury herein, and the court having heard the evidence and proofs offered on behalf of the plaintiff, the defendant moves for judgment of dismissal, with costs, for the reasons stated in the record herein, which motion is by the court denied, defendant excepts and exception is allowed; thereupon the court heard the evidence and proofs of the defendant and of the plaintiff and the same and all thereof having thereafter been submitted to the court for its decision and the court having considered the same together with the briefs and arguments of the parties respectfively, and being now fully advised in the premises, the court finds the following facts:

FINDINGS OF FACTS:

I. That on and for some time prior to the 20th day May, 1910 the defendant M. P. Fleischman owned and conducted a general merchandise store and business in the town of Rampart, Fourth Division, Territory of Alaska, and was on said day the owner of a stock of dry-goods, groceries, provisions etc. used by him in his said business.

II. That on said 20th day of May, 1910 defendant sold to the plaintiff Julius Rahmstorf his said stock of dry-goods, groceries, provisions etc. and the good-will of said business and immediately thereafter and before the 26th day of May 1910 delivered the same to the plaintiff, and upon the said 26th day of May 1910 the plaintiff paid to de-

fendant the full consideration therefor, to-wit, the sum of $1791.15.

III. That thereupon and thereafter and up until about the month of January, 1911 the defendant entered into and remained in the employ of the said plaintiff as clerk in the plaintiff's store and place of business in said Rampart, on wages, and during said time defendant was the U. S. Postmaster at said Rampart and conducted said post-office in the planitiff's place of business while so clerking for plaintiff.

IV. That said post-office was a valuable adjunct and agency in the bringing of trade to the said store and place of business of the plaintiff.

V. That on the said 26th day of May, 1910 and after the sale of the said merchandise business by defendant to plaintiff, at the request of plaintiff the defendant made and delivered to plaintiff a written agreement in words and figures as follows:

"For and in consideration of the sum of One Dollar to me in hand paid by Julius Rahmstorf of Rampart Alaska, I, M. P. Fleischman of Rampart Alaska, hereby agree to the following:

That should I resign my position as Postmaster of Rampart, Alaska, I will do so in favor of Julius Rahmstorf providing he be eligible at the time of my resignation.

I also hereby agree and promise not to engage in any way in the line of general merchandise for the next three years, that is up to May 26, 1913, inclusive, in the city of Rampart, Alaska, and

should I do so, I hereby promise to forfeit the sum of Two Thousand Dollars. This last clause shall have no effect, should the said Julius Rahmstorf discontinue business before May 26, 1913.

M. P. FLEISCHMAN.

Signed in the presence of

F. J. KALNING.

Dated at Rampart, Alaska, May 26, 1910."

That the said agreement was given with the view and understanding that defendant was then intending to leave Alaska because of the illness of his wife, but the wife of defendant thereafter and on or about the month of February 1911 (1912) died, and the defendant for that reason remained in said Rampart, Alaska.

VI. That on or about the month of January 1911 the defendant left the employ of the plaintiff as clerk, but did not resign his position as postmaster of said Rampart, and moved said postoffice from the building of said plaintiff to a building owned in part by defendant and in part by one J. H. Hudgin in said Rampart, Alaska, where he has since conducted the same.

VII. That on or about June 1, 1912 one F. J. Kalning of Rampart Alaska, employed the defendant to go to Tanana Alaska and there purchase a stock of dry-goods, groceries, provisions etc., giving the defendant the money to make such purchase, and the defendant did select and purchase for the said Kalning such stock. That thereafter the said F. J. Kalning opened up a general mer-

chandise business on his own credit and account in the building so occupied by defendant with the U. S. Post Office, which said premises the said F. J. Kalning has since rented of the defendant and said J. H. Hudgin for that purpose.

VIII. That since on or about said June 1, 1912 the said F. J. Kalning has conducted said merchandise business at the premises aforesaid.

IX. That on or about said June 1, 1912, and soon after the defendant returned from said Tanana as aforesaid, the said F. J. Kalning sought to employ the defendant as a clerk in his said store, and defendant agreed to do so provided the said Kalning would permit the defendant to retain said U. S. Post Office in said building and conduct and attend the same as postmaster; that the said Kalning agreed to said terms, and to pay the plaintiff the sum of $75.00 per month and board for such service, and the defendant has continued in such employ as incidental to his duties as such postmaster, ever since said date.

X. That in such employ as clerk for said F. J. Kalning, the defendant has never used or permitted to be used his own name or credit in connection with such business of F. J. Kalning known as the "Miner's Store," nor has he in any manner sought to draw off the customers of the said plaintiff, but on the contrary has expressly refrained from so doing.

XI. That while the defendant did not consider the agreement referred to in Finding No.

V binding upon him after he determined to remain in Alaska and keep his said postoffice position, he has in no manner violated the terms thereof by his employment as aforesaid.

XII. That the plaintiff has not been damaged in any sum whatsoever by the conduct of the defendant in his said employment with said "Miner's Store," or at all.

CONCLUSIONS OF LAW.

As conclusions of law based on the foregoing facts, the court finds as follows:

I. That the agreement sued upon herein and set out in finding of fact No. V, is without legal effect and void.

II. This action should be dismissed.

And

III. The defendant is entitled to judgment against the plaintiff for his costs and disbursements in this behalf expended.

.....

District Judge.

Dated at Fairbanks Alaska, this January..... 1914.

(Acknowledgement of due service attached.)

[Title of Court and Cause.]

Judgment.

This cause having come on regularly for trial before the court on the 12th day of January, 1914, the plaintiff appearing in person and by Guy B. Erwin his attorney and defendant appearing in person and by his attorney L. R. Gillette, both

parties in open court waiving trial by jury; and the court having heard and considered the evidence and proofs offered on behalf of the parties respectively, and the arguments and briefs of counsel, and having fully considered the same, and having heretofore made and signed its findings of fact and conclusions of law in the premises and being now fully advised in the premises, NOW THEREFORE

IT IS HEREBY CONSIDERED, ORDERED AND ADJUDGED that the plaintiff take nothing by his said action and that the same be and is hereby dismissed, and that the defendant have his costs and disbursements herein expended in the sum of $..... and execution therefor.

Done in open court this January..... 1914.

.....

District Judge.

AND BE IT FURTHER REMEMBERED, that thereafter and over the objection of the defendant, in words and figures as follows:

[Title of Court and Cause.]

Objections to Plaintiff' Proposed Findings of Fact & Conclusions of Law.

Comes now the defendant M. P. Fleischman and objects to the court making the findings of fact and conclusions of law submitted by the plaintiff herein, and as grounds of objection states:

FINDINGS OF FACT.

I. Proposed findings of fact numbered I, II and III are against the law and the evidence in

this case, because the evidence shows the said sale to have been consummated on May 20, 1910 for the sum of $1791.15, and the said agremeent on its face shows that it was and is a separate transaction, upon a separate and distinct considertion and subject matter (if any) and has nothing to do with the sale of said business and the good will thereof.

2. Proposed finding of fact Numbered IV is against the law and the evidence in this case, for the reason that the evidence shows that defendant did not, at the time alleged in the complaint or at any other time after said sale, open or conduct, either as manager, managing clerk or otherwise, a merchandise business at said town of Rampart Alaska, in violation of said agreement or otherwise, or at all; and said agreement being void in law for want of legal subject matter or consideration, said finding is incompetent, irrelevant and immaterial.

3. Proposed finding of fact Numbered V is against the law and the evidence in this case, for the reason that the evidence shows (1), that the defendant has not since said June 1st, 1912 opened and conducted a line of merchandise at said Rampart Alaska, either as manager, managing clerk or otherwise as alleged in the complaint, or in violation of said agreement, or at all; and (2) there is no evidence in the case showing or tending to show that plaintiff has been damaged in the sum of two thousand dollars, or any other sum, or at all, by reason of the defendant clerking in the store of F. J. Kalning as shown by the evidence.

4. Proposed finding of fact numbered VI is incompetent, irrelevant and immaterial on the grounds and for the reasons hereinbefore stated.

5. The proposed findings of fact are, as a whole, against the law and the evidence in this case for the reasons (1) that the contract or agreement therein referred to is of no binding and legal force and effect, and is void; (2) that even though the same be held legally binding, there is no evidence in the case to show that the defendant has ever violated the terms thereof; and (3) that even though there were evidence to show or tending to show that the defendant had violated the terms thereof by clerking for the said F. J. Kalning "Miner's Store" as shown by the evidence, the plaintiff, having alleged damages therefrom, has wholly failed in the proof of damage by reason of the defendants acts, or at all.

CONCLUSIONS OF LAW.

Defendant objects to the signing, making or entering of plaintiff's proposed conclusions of law numbered I, II, III, IV, and V on the grounds and for the reasons hereinbefore set out, and on the further ground that each and every thereof are against the law and the evidence in this case.

L. R. GILLETTE,
Attorney for Plaintiff,

(Acknowledgment of service attached.)

the Court approved, made, and entered findings and verdict in favor of the plaintiff and against the defendant, in words and figures as follows:

[Title of Court and Cause.]

Findings of Fact and Conclusions of Law.

This matter having come on regularly for trial before the above entitled court on the 12th day of January, 1914, Guy B. Erwin appearing for the plaintiff and L. R. Gillette appearing for the defendant, both parties waiving a jury; and the court having heard the evidence and proofs offered on behalf of the said plaintiff and defendant respectively, and the records and papers in said cause, and the said cause being submitted to the court for its decision and the court having considered the same, and the briefs and arguments of said attorneys, now finds the following facts:

FINDINGS OF FACT.

I.

That on or about the 26th day of May, 1910, and for a long time prior thereto, defendant above named owned and conducted a general merchandise store and business in the town of Rampart, Fourth Division, Territory of Alaska, and was on said day the owner of a stock of dry-goods, groceries, provisions &c used by him in his said business.

II.

That on said 26th day of May, 1910, defendant sold to plaintiff his said stock of dry-goods, groceries, provisions &c and the good-will of the said business for the consideration of $1791.15.

III.

That on the said 26th day of May, 1910, in consideration of the sale of his business aforesaid, and

as a part of said transaction, the defendant executed and delivered to plaintiff his certain contract in writing, in the words and figures as follows, to-wit:

"For and in consideration of the sum of One Dollar to me in hand paid by Julius Rahmstorf of Rampart Alaska, I, M. P. Fleischman of Rampart, Alaska, hereby agree to the following:

That should I resign my position as Postmaster of Rampart, Alaska, I will do so in favor of Julius Rahmstorf providing he be eligible at the time of my resignation.

I also hereby agree and promise not to engage in any way in the line of general merchandise for the next three years, that is up to May 26, 1913, inclusive, in the City of Rampart, Alaska, and should I do so I hereby promise to forfeit the sum of Two Thousand Dollars. This last clause shall have no effect, should the said Julius Rahmstorf discontinue business before May 26, 1913.

M. P. FLEISCHMAN,

Signed in the presence of

F. J. KALNING.

Dated at Rampart, Alaska, May 26, 1910."

IV.

That on or about the 1st day of June, 1912, the defendant in violation of his said agreement with plaintiff, entered into and engaged in the line of general merchandise and carried on said business in the capacity of manager and managing clerk of a general merchandise store known as the "Miner's Store," in the town of Rampart, Territory of Alas-

ka, near plaintiff's place of business, being a like business to that referred to in said agreement in writing, and that defendant continued in said business from the 1st day of June, 1912 to the 26th day of May 1913, and after said date.

V.

That by reason of the defendant entering into and engaging in the line of general merchandise and carrying on same in the capacity of manager and managing clerk as aforesaid, the plaintiff has been damaged in the sum of Two Thousand Dollars, no part of which sum has been paid to plaintiff by defendant.

VI.

That plaintiff ever since said 26th day of May, 1910, has been and now is continuing in said general merchandise business purchased by him from defendant in the town of Rampart, Alaska.

CONCLUSIONS OF LAW.

And as conclusions of law from the foregoing facts, the court finds:

I.

That the agreement entered into by defendant on the 26th day of May, 1910, a copy of which is set out in the III finding of facts above, was a good, valid and legal agreement, based upon a sufficient consideration, and enforceable at law.

II.

That the acts of defendant in entering into and engaging in the line of general merchandise and carrying on said business in the capacity of man-

ager and managing clerk of the general merchandise store known as the "Miner's Store" at Rampart Alaska, from the 1st day of June, 1912 to the 26th day of May, 1913 was a violation and breach of said agreement, and entitles the plaintiff to damages.

III.

That the defendant having agreed to and inserted in the agreement the sum to be forfeited by him in the event of a breach thereof should be construed and is construed as liquidated damages, and that no proof of actual damages upon the part of the plaintiff was necessary in this case.

IV.

That the violation and breach of the agreement by defendant damaged the plaintiff to the extent of Two Thousand Dollars.

V.

That by reason of the foregoing facts the plaintiff is entitled to recover judgment against the defendant in the sum of Two Thousand Dollars, together with his costs and disbursements.

Dated: January 24, 1914.

F. E. FULLER,
District Judge.

(Acknowledgment of service attached.)

AND BE IT FURTHER REMEMBERED that thereafter, and within the time allowed by law, the defendant filed his motion for a new trial of said action, in words and figures as follows, to-wit:

[Title of Court and Cause.]

Motion for New Trial.

Comes now the defendant and moves the court now here to set aside its findings and decision heretofore made and entered in favor of the plaintiff and against the defendant and to grant a new trial herein, and as grounds of motion states:

I.

The evidence in this action is insufficient to justify the verdict, findings and decision of the court made and entered herein, in that:

(a) The evidence shows that the stock of goods, wares and merchandise sold by defendant to plaintiff on May 20, 1910 was sold upon inventory at cost price, to-wit, the sum of $1791.15 which was paid to the defendant on May 26, 1910, and if said sale included also the good-will of said business the same was without consideration, and there is no evidence in the case to the contrary.

(b) The evidence shows the sale alleged to have been made, to have been consummated on the said 19th or 20th day of May, 1910; that the agreement signed by the defendant on or about the 26th day of May, 1910 and upon which this action is based does not carry with it the good-will of the business so sold and disposed of by defendant to plaintiff nor import any consideration therefor, but on the contrary shows that said agreement is and was independent of the sale and transfer of said stock of goods and business by defendant to plaintiff, upon a separate and distinct subject-matter and

consideration (if any), and was made conditional upon the defendant turning over the U. S. Post Office at Rampart Alaska to plaintiff in the event the defendant resigned therefrom and left Alaska, neither of which contingencies happened nor was the defendant under any obligation to carry out or perform either of them.

(c) The evidence does not show or tend to show that the acts of the defendant in clerking in the store of F. J. Kalning as shown by the evidence, in any manner damaged or interfered with the business of the plaintiff subsequent to said sale of May 20th, 1910; but on the contrary the evidence shows that the defendant was within his rights as a citizen in accepting employment with the said F. J. Kalning as shown by the evidence.

(d) There is no evidence to show that the defendant opened and conducted any merchandise business whatsoever subsequent to the sale of said business by the defendant to plaintiff on May 20, 1910; but on the contrary the evidence shows that said F. J. Kalning opened and conducted said merchandise business known as the "Miner's Store" at Rampart Alaska on or about June 1, 1912 and has since owned and conducted the same, and that defendant accepted employment as a clerk in said store upon a salary and during his said employment he has not used his own name or credit nor sought to draw off the customers of plaintiff but has expressly refrained from so doing.

(e) There is no evidence in the case to show that

the defendant was ever manager or managing clerk of said F. J. Kalning business or "Miner's Store," nor that as such, or at all, have the acts of the defendant in any wise prejudiced or damaged the business of plaintiff.

(f) The evidence in this case shows that the good-will of the business sold by defendant to plaintiff on May 20, 1910 did not pass to the plaintiff until some time in the year 1912 when plaintiff secured the agency of the North American Trading & Transportation Company, and that until that time the plaintiff was a tenant of the said company of which the defendant up until that time was agent and collected rents from the plaintiff.

(g) The evidence shows that at the time defendant sold said business to the plaintiff, defendant was the agent for and conducting his business as successor of the said North American Trading & Transportation Company, and had no authority to sell and did not sell the good-will of said corporation to the plaintiff, and the name and goodwill of said corporation and the agency thereof came to the plaintiff some time in the year 1912 and not prior thereto.

II.

Certain errors of law occurred at the trial of this cause, to which the defendant excepted to, as follows:

1. The court erred in permitting the plaintiff to offer any testimony in said cause under the pleadings herein, for the reason that defendant was and

is entitled to judgment on the pleadings.

2. The court erred in denying the defendant's motion at the conclusion of the plaintiff's case in chief to dismiss the plaintiff's case for failure of proof of the matters and things alleged in the complaint and reply of the plaintiff.

3. The court erred in sustaining plaintiff's objections to testimony offered on behalf of the defendant showing or tending to show that plaintiff had sustained no damage by reason of the acts of the defendant in accepting employment and engaging as clerk for the said F. J. Kalning in the said "Miner's Store" at Rampart Alaska between June 1, 1912 and the time of the trial.

4. The court erred in holding that the said contract or agreement of May 26, 1910 was a valid and binding contract upon a sufficient consideration and for a lawful purpose.

5. The court erred in overruling the objections of the defendant to the proposed findings of fact and conclusions of law of the plaintiff herein, and in making and entering said findings and conclusions of the plaintiff.

L. R. GILLETTE,
Attorney for Defendant.

(Acknowledgment of service attached.)

AND BE IT FURTHER REMEMBERED that thereafter the matter of said motion for new trial came on for argument by the respective counsel of the parties, after which argument had the following proceedings were had and the court rendered

its oral opinion, in words and figures as follows:

[Title of Court and Cause.]

Opinion of Court On Motion for New Trial.

FULLER, DISTRICT JUDGE: (Orally)—In the case of Rahmstorf against Fleischman on motion of the defendant for a new trial, I have considered the authorities presented. The matters were practically all argued at length and passed upon at a previous stage in the trial, except the contention of the defendant that the contract sued upon provided for a penalty, rather than for compensation for damages or liquidated damages. That wasn't considered at any length before.

But I am inclined to take the view that I did at the trial: That this is a matter in which the parties themselves had fixed upon the amount of the damages. It is true, as contended by Fleischman, that the word "Forfeit" in the contract would ordinarily indicate penalty rather than liquidated damages; but the courts hold universally at the present time that the language used in such a contract is not controlling; that the court will look at the whole contract and the purposes for which it was entered into for its meaning, rather than to the language used by the parties.

It seems to me that the contract in this case shows that the intention of the parties was a sale of the stock of goods, and that Fleischman should not enter into business in competition with the purchaser in any way for three years—if he did so, that it was the intention that this sum of two

thousand dollars should be the amount of damages that he should pay.

Undoubedly, some of the authorities cited by the defendant sustain his contention, and in some of the States I have'nt any doubt that this contract would be regarded as a contract for penalty rather than for liquidated damages; but from the authorities in the State of Washington and, I think, the Supreme Court of the United States, it can reasonably be inferred that where the parties had freely contracted in regard to the matter and agreed that the amount specified should be considered as liquidated damages, the courts will consider it so rather than to go beyond the contract and construe it as penalty and permit them to prove actual damages.

The matter is considered at considerable length in the case of Sun Printing & Publishing Co. v. Moore (183 U. S. 642; 46 L. Ed., 366), the opinion in which is by our present Chief Justice of the United States and which, in fact, I think overrules a great many of the prior decisions. In that case it is said the courts should not attempt to make contracts themselves, when the parties have, for a fair consideration and dealing at arms' length, made a contract themselves. It seems to me this contract in question was entered into without any duress or restraint on either side, and that the parties have contracted what the damages should be. I dont see any reason why the contract as they made it should not be carried out.

Even if this contract should be construed as containing provisions for penalty rather than liquidated damages, the result might not have been different because, as testified by the plaintiff, the damages he actually sustained exceeded this amount. Of course the testimony was limited, so that the truth of this statement was'nt admitted, and the cross-examination was restricted on that point. There would have been error, of course, if the contrary rule had prevailed—I mean if it were true the contract was for penalty rather than liquidated damages. But, as I say, the result might not have been different even if evidence had been admitted to that effect.

The motion for new trial is denied.

(By Mr. Gillette: For defendant.) The court will allow us an exception to its ruling.

(The Court): An exception will be allowed.

(Mr. Gillette): We would like now to have sixty days within which to file bill of exceptions and prepare our papers on appeal. I presume that will not be objected to.

(Mr. Erwin. For plaintiff): No, we have no objection to giving the defendant a reasonable time of course.

AND BE IT FURTHER REMEMBERED, that thereafter, and over the objection and exception of the defendant, the Court made and entered judgment against the defendant in favor of the plaintiff.

ORDER ALLOWING AND SETTLING BILL OF EXCEPTIONS.

And now on this 23 day of May, A. D., 1914, the defendant having heretofore served notice on the adverse party of his intention to present for settlement and allowance his bill of exceptions herein as a basis for writ of error, and the same now being filed and presented, the plaintiff appearing by Guy B. Erwin his attorney and the defendant appearing by L. R. Gillette his attorney, and the parties respectively being heard upon the same, and the court being fully advised,

IT IS THEREFORE ORDERED that the foregoing 45 pages of written and typewritten matter be and the same is hereby allowed and settled as a true bill of exceptions herein, and the same be and is hereby approved and certified as such and made of record in said cause and ordered to be filed with the Clerk of this Court.

Done in open court at Fairbanks Alaska, this 23d day of May, A. D., 1914.

F. E. FULLER,
Judge of the District Court,
4th Division of Alaska.

(Entered in Court Journal No. 12 page 933.)

(Indorsed) Received Clerk of the Court Office May 8, 1914, Angus McBride, Clerk.

Filed May 23rd, 1914. Angus McBride, Clerk, by P. R. Wagner, Deputy.

[Title of Court and Cause.]

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Judicial Circuit:

Comes now the above named defendant by his attorney, and complains that in the record and proceedings had in said cause, and also in the rendition of the judgment in the above entitled cause in the said District Court for the Territory of Alaska, Fourth Judicial Division in favor of the above named plaintiff and against the above named defendant on the 9th day of March, A. D., 1914, manifest error hath happened to the great damage of the said defendant.

WHEREFORE the said defendant prays for the allowance of a writ of error herein, and for an order fixing the amount of bond for a supersedeas in said cause, and for such other orders and process as may cause the same to be corrected by the said District Court for the Territory of Alaska, Fourth Judicial Division.

Dated this 5th day of January, A. D., 1914.

L. R. GILLETTE,
Attorney for Defendant.

United States of America,
Fourth Division,
Territory of Alaska.—ss.

L. R. Gillette, being first duly sworn on oath deposes and says:

I am attorney for the defendant named in the

above and foregoing Petition for Writ of Error, and as such conducted the trial and all proceedings in said district court on behalf of said defendant among which is the signing of the foregoing Petition;

That, as affiant is informed by said defendant and believes and so alleges, not until on or about the 15th day of November, 1914 was the said defendant financially able to proceed with his said appeal and pay counsel fees and costs incident thereto, whereupon he notified affiant to perfect said appeal or writ and prosecute the same to effect; that such notice was received by telegram from Rampart Alaska, and there being then no judge for the foregoing entitled court, the judge who tried said cause and settled the bill of exceptions having resigned his said position, affiant waited a reasonable time to ascertain whether a successor would be appointed by the President to succeed said judge resigned in time to perfect said writ; that an appointment has been made for such vacancy, but at the date of making this affidavit affiant is not advised that the appointee has been confirmed or qualified, and even if he had it would be impossible for affiant on behalf of his said client to perfect said writ within the year allowed for the same, because of various statutory notice of terms of court and other formalities which might intervene to cut off defendant's rights by lapse of time; that defendant has duly filed in the Lower Court his Assignment of Errors. Wherefore affiant prays

as in the petition.

L. R. GILLETTE,

SUBSCRIBED in my presence and sworn to before me this 5th day of January, 1915.

C. C. HEID,
Notary Public for Alaska.

My commission expires Oct. 21, 1917.

United States of America,
Territory of Alaska
Fourth Judicial Division.—ss.

I hereby certify the within and foregoing constitutes a full, true and correct copy of the original Petition for Writ of Error on file (or to be filed) in the said entitled court and cause.

Dated at Fairbanks, Alaska, this 5th day of January, 1915.

L. R. GILLETTE,
Attorney for Deft.

(Acknowledgment of due service attached.)

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div Jan 5, 1915. Angus McBride, Clerk, by P. R. Wagner, Deputy.

[Title of Court and Cause.]

Writ of Error.

United States of America.—ss.

The President of the United States of America to the Honorable Charles E. Bunnell the Judge of the United States District Court for the Territory of Alaska, Fourth Judicial Division: Greeting—

Because in the record and proceedings, as also

in the rendition of the judgment of a plea which is in the said District Court, before you, between Julius Rahmstorf, plaintiff, and M. P. Fleischman, defendant, manifest error hath happened to the great prejudice and damage of the said defendant, M. P. Fleischman, as is said and appears by the petition herein,

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties in this behalf, do command you if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco and State of California, together with this writ, so as to have the same at the said place in said circuit on the fourth (4th) day of February, 1915, that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States, should be done.

Witness, THE HONORABLE EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 5th day of January, A. D. one thousand nine hundred fifteen.

Attest my hand and Seal of the United States District Court for the Territory of Alaska Fourth Judicial Division, at the Clerk's office at Fair-

banks, on the day and year last above written.

(Court) ANGUS McBRIDE,
(Seal) Clerk District Court, for the
Territory of Alaska,
Fourth Division.

United States of America,
Territory of Alaska,
Fourth Judicial Division.—ss.

I hereby certify that the within and foregoing constitutes a full, true and correct copy of the Writ of Error on file (or to be filed and issued) in the within entitled court and cause.

Dated at Fairbanks, Alaska, this 5th day of January, 1915.

L. R. GILLETTE,
Atty. for Defendant and one
of Attys. for Plff, in Error.

(Acknowledgment of due service attached.)

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div. Jan 5, 1915. Angus McBride, Clerk.

[Title of Court and Cause.]

Order Allowing Writ of Error.

And now on this 25th day of January, A. D., 1915 it appearing to the Judge of the above entitled court that on the 5th day of January 1915 and during the vacancy of the bench of said court the defendant in error, in pursuance of his bill of exceptions theretofore duly settled and filed a notice of suing out writ of error herein, filed in said court and cause his petition for writ of error accompanied

by an assignment of errors, and thereafter and on said day caused writ and citation to issue under the teste of the Clerk of this court in pursuance of which the record is now being printed at Fairbanks under rule of this court, for presentation of said cause on writ of error to the U. S. Circuit Court of Appeals for the Ninth Judicial Circuit; and further that said citation being made returnable within thirty (30) days of the issuance thereof to-wit on February 4th, 1915 which will not permit of return being made to said writ, it is necessary that the defendant in error have a further extension of time within which to present his record to the said Circuit Court, and counsel for plaintiff being present and consenting to the form of said order but reserving all objections & exceptions to the substance of said proceedings.

IT IS ORDERED that writ and citation issue herein as of said January 5th, 1915 and that the said defendant as plaintiff in error have an extension of thirty (30) days from said February 4th, 1915, within which to perfect said writ of error and make return to the same.

DONE IN CHAMBERS at Fairbanks Alaska, this January 25th 1915.

CHARLES E. BUNNELL,
Judge.

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div. Jan 25, 1915. Angus McBride, Clerk, by P. R. Wagner, Deputy.

[Title of Court and Cause.]

Assignments of Errors.

Comes now the defendant, and files the following Assignment of Errors upon which he will rely upon his prosecution of the writ of error in the above entitled cause from the judgment made and entered by this honorable court on the 9th day of March, A. D., 1914 in the above entitled cause.

I.

That the District Court for the Territory of Alaska, Fourth Judicial Division, erred in overruling the demurrer of the defendant and plaintiff in error to the original complaint and reply filed in said cause.

II.

That the said court erred in denying the motion of defendant and plaintiff in error for judgment upon the pleadings as settled in said cause.

III.

That the said court erred in permitting the plaintiff (defendant in error) to introduce evidence in support of his said complaint and reply, because the same are insufficient in law to entitle said plaintiff (defendant in error) to the relief demanded or any relief, or to constitute a cause of action against the defendant (plaintiff in error.)

IV.

That the said court erred in permitting the plaintiff (defendant in error) to introduce, and in receiving in evidence the purported contract or agreement marked "Plaintiff's Exhibit A," as follows:

"For and in consideration of the sum of one

dollar to me in hand paid by Julius Rahmstorf, of Rampart, Alaska, I, M. P. Fleischman hereby agree as follows. That should I resign my position as postmaster of Rampart, Alaska, I will do so in favor of Julius Rahmstorf, provided he be eligible at the time of my resignation. I also hereby agree and promise not to engage in any way in the line of general merchandise for the next three years, that is, up to May 26, 1913, inclusive, in the city of Rampart, Alaska; and, should I do so, I hereby promise to forfeit the sum of two thousand dollars. This last clause shall have no effect should said Julius Rahmstorf discontinue business before May 26, 1913.

M. P. FLEISCHMAN.

Signed in the presence of

F. J. KALNING.

Dated at Rampart, Alaska, May 26, 1910."

over the objection of the defendant (plaintiff in error) that the same was irrelevant, incompetent, and immaterial, not sufficient in law as a basis of an action of this kind, and because the pleadings show that it was not incident to the sale of the business or stock of merchandise by Fleischman to Rahmstorf, but incident to a contract over the post-office—a separate agreement from the sale altogether as testified to by said Rahmstorf.

V.

The said court erred in permitting the plaintiff (defendant in error) to introduce, and in receiving in evidence the receipt marked "Plaintiff's Exhibit

B," as follows:

"Rampart Alaska, 5-26-10. Received from Julius Rahmstorf seventeen hundred ninety-one 15-100 Dollars ($1791.15) for a stock of merchandise, as payment in full.

M. P. FLEISCHMAN."

over the objection of the defendant (plaintiff in error) as set forth in Assignment of Error IV.

VI.

The said court erred in permitting the said Julius Rahmstorf to testify generally as to damages in answer to the following question of his counsel: "Q. Have you been damaged by the fact that this store was opened up there?" (Meaning the Miner's Store of F. J. Kalning wherein said Fleischman was employed as clerk in said Rampart Alaska from and after about June 1, 1912, which said employment constitutes the sole alleged breach of said agreement of May 26, 1910); over the objection of counsel for defendant below that the same was irrelevant, incompetent and immaterial and called for the conclusion of the witness, and said witness should be required to state the facts from which the court could reach a conclusion, on the question of damages.

VII.

The said court erred in permitting the said Julius Rahmstorf to testify as to matters outside the expressed substance of said claimed agreement "Plaintiff's Exhibit A," in answer to the following question of his counsel as follows: "Q. Were the terms

of this agreement, Plaintiff's Exhibit A discussed during the transaction?" over the objection of the defendant that the same was irrelevant, incompetent and immaterial, the agreement declared upon being in writing and not ambiguous upon its face.

VIII.

The said court erred in denying the motion of the defendant below, made at the point when the plaintiff below had rested his case in chief, for judgment in favor of said defendant upon the pleadings and the evidence then before the said court, on the ground generally that said plaintiff had entirely failed to prove his case, for the reasons (1) that the evidence of said plaintiff shows that the agreement, Plaintiff's Exhibit A was induced by the proviso therein as to the post-office at Rampart Alaska and the promise of the agency of the N. A. T. & T. Company, and not by the sale of the Fleischman stock of merchandise; (2), further that the contract for the purchase of the Fleischman stock was consummated some time in April, 1910 but before May, 1910, and the said agreement of May 26, 1910 was therefore separate and apart from said sale and on a separate consideration; (3) that even if said agreement of May 26, 1910 be considered valid and binding, the evidence fails to show that the defendant has violated the same, and (4) while plaintiff testifies he has been damaged in his business from June 1, 1912 to May 26, 1913 for more than the amount specified in said agreement of May 26, 1910 there is no evidence to show of what

such damage consists, or what amount of business the plaintiff did prior and subsequent to said alleged breach, or that any loss of business claimed was attributable to the acts of the said defendant.

IX.

The said court erred in its decision, upon the motion mentioned in Assignment No. VIII, by which the defendant was compelled to introduce evidence after failure of proof on the part of the said plaintiff.

X.

The said court erred in sustaining the objection of the plaintiff below propounded by the said defendant to the witness Julius Rahmstorf when called as a witness on behalf of the said defendant, as follows: "Q. What merchandise license did you pay for the year 1912?" said witness already having testified that he paid such license under the laws of Alaska for the year 1911 on the basis of from $10,000 to $20,000 annual business, and the purpose of said question being to show by the answer of said witness that he paid said Alaska license on his said business at Rampart for the year 1912 and 1913 at the same rate as for 1911, showing that it was untrue that said plaintiff had been damaged by the alleged acts of the defendant.

XI.

The said court further erred, in connection with the error last before assigned, in ruling and deciding upon the right of the parties as to the introduction of evidence, as follows:

"(Mr. Gillette): This is a damage suit,—

(The Court): It is an action for damages, and the damages are fixed by the terms of the contract.

(Mr. Gillette): Does the Court hold that the plaintiff must not show damages, even under that contract?

(The Court): I think, if the plaintiff is entitled to damages, that they are fixed by that contract," to which said decision the defendant below then and there excepted.

XII.

The said court erred in excluding from evidence and denying the offer of defendant below to prove, (a) that the merchandise licenses required under the laws of Alaska for the Miner's Store at Rampart Alaska (the store in which Fleischman was employed as clerk which constitutes the sole alleged ground of breach of said contract Plaintiff's Exhibit A) for the years June 1, 1912 to and including the year 1913 and to the date of the trial in 1914 were paid for and taken out in the name of F. J. Kalning, as proving or tending to prove the issue on behalf of said defendant; and (b) that the merchandise licenses required under the laws of Alaska for the years 1911, 1912 and to the time of said trial for the store of said Julius Rahmstorf at Rampart Alaska, which business is the alleged object of the damages claimed, were taken out and paid for by said Rahmstorf at the same statutory schedule rate after the alleged damage as before,

which proves or tends to prove that it is not true as testified by said Rahmstorf that his business decreased fifty per cent or more after Fleischman began clerking in said Miner's store.

XIII.

The said court erred in excluding the evidence called for by, and in sustaining the objection of the plaintiff below to the following question propounded to the said defendant while on the stand in his own behalf, as follows:

"Q. I will ask you to state whether your acts, in your working for the Kalning store as you have testified, ever in any manner damaged the plaintiff in this action?

(Mr. Erwin): We object to that as calling for a conclusion of the witness, which is a matter for the court to determine," and especially was such ruling error since the court had, over the objection of said defendant, permitted said plaintiff to state generally and without producing the best evidence in the way of books of account &c, that the acts of said Fleischman in clerking in the Miner's Store had damaged him (Rahmstorf) in more than fifty per cent. of his sales.

XIV.

The said court erred in permitting plaintiff below, at the conclusion of the evidence, to amend paragraph four of his complaint by inserting at the end thereof the words "as managing clerk of the Miners Store at Rampart," over the objection of the said defendant that such amendment so

changed the issues as to constitute a violation of the laws of Alaska relating to amendments of pleadings, and to injure the substantial rights of the defendant.

XV.

The said court erred in overruling the motion of the said defendant made at the conclusion of the evidence, for judgment upon the pleadings and the evidence then before the court.

XVI.

The said court erred in refusing to make and enter in said court and cause, the special findings, conclusions and judgment propounded on behalf of said defendant.

XVII.

The said court erred in overruling the objections of the said defendant to the proposed findings, conclusions on behalf of said plaintiff and against said defendant, and in making and entering the same, for the reasons set forth in said objections of defendant and others appearing upon the face of the proceedings.

XVIII.

The said court erred in its decision and ruling upon the motion for a new trial made by the said defendant (which said decision is set forth at length in the record herein), and especially holding thereby, on the question reserved for argument after trial, that the said contract "Plaintiff's Exhibit A" provided for measured or liquidated damages instead as for penalty as therein provided, and

in entering judgment for the plaintiff below for the sum of $2000.00 damages without any proof thereof or opportunity on behalf of said defendant to show to the contrary.

WEREFORE, the said errors being to the substantial injury and detriment of the defendant below, he prays that the judgment be reversed &c.

L. R. GILLETTE,
Attorney for Defendant and
Plaintiff in Error.

United States of America,
Territory of Alaska,
Fourth Judicial Division.—ss.

I hereby certify the within and foregoing constitutes a full, true and correct copy of the original Assignment of Errors on file (or to be filed) in the said entitled court and cause.

Dated at Fairbanks, Alaska, this 5th day of January, 1915.

L. R. GILLETTE,
Attorney for Defendant.

(Acknowledgment of due service attached.)

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div. Jan 5, 1915. Angus McBride, Clerk, by P. R. Wagner, Deputy.

[Title of Court and Cause.]

Citation on Writ of Error.

The United States of America.—ss.

The President of the United States to the above named plaintiff Julius Rahmstorf, and to Guy B. Erwin, his attorney: Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco in the State of California on the fourth day of February next ensuing and within thirty (30) days of the date of this writ, pursuant to a writ of error filed in the office of the Clerk of the above entitled court, wherein M. P. Fleischman is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

WITNESS, the HONORABLE EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 5th day of January, A. D. 1915, and of the Independence of the United States of America the one hundred and thirty-ninth.

Attest:

ANGUS McBRIDE.

Clerk of the United States District Court
Territory of Alaska, Fourth Division.

(Court)
(Seal)

United States of America,
Territory of Alaska
Fourth Judicial Division.—ss.

I hereby certify the within and foregoing constitutes a full, true and correct copy of the original Citation on Writ of Error on file (or to be filed) in the said entitled court and cause.

Dated at Fairbanks, Alaska, this 5th day of January, 1915.

L. R. GILLETTE.
Attorney for Defendant.

(Acknowledgment of due service attached.)

[Title of Court and Cause.]

Bond on Writ of Error.

KNOWN ALL MEN BY THESE PRESENTS that we, M. P. Fleischman as principal, and Chas. Swanson and W. B. Ballou as sureties, are held and firmly bound unto Julius Rahmstorf plaintiff above named, in the sum of Five Hundred Dollars ($500.00) to be paid to the said Rahmstorf, his executors or adminisrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our executors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 16 day of January, 1915.

Whereas, the above defendant M. P. Fleischman has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above entitled cause made and entered therein on March 9, 1914 in favor of said plaintiff and against the defendant; NOW THEREFORE, the condition of this obligation is such that if the above named M. P. Fleischman shall prosecute said writ to effect, and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; other-

wise to remain in full force and virtue.

M. P. FLEISCHMAN
Principal.
CHAS. SWANSON
W. B. BALLOU
Sureties.

United States of America,
Fourth Division,
Territory of Alaska.—ss.

Chas. Swanson and W. B. Ballou of Rampart Alaska, sureties in the above and foregoing undertaking, being first duly sworn, on oath each for himself and not one for the other, deposes and says:

I am a resident of the Territory of Alaska; I am not a counselor, attorney, clerk, marshal or other officer of any court, and I am worth the sum of $500.00 specified in said undertaking over and above all just debts and liabilities, and exclusive of property exempt from execution.

CHAS. SWANSON
W. B. BALLOU

Subscribed in my presence and sworn to before me this 16th day of January, A. D., 1915.

(Seal) GEO. W. LEDGER,
United States Commissioner.

O. K. as to form and amount.

GUY B. ERWIN,
Attorney for Plaintiff and
Defendant in Error.

The within Bond is hereby approved this 26th

day of January, 1915.

CHARLES E. BUNNELL.
District Judge.

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div. Jan 26, 1915. Angus McBride, Clerk, by P. R. Wagner, Deputy.

Clerk's Certificate to Record:

United States of America,
Territory of Alaska,
Fourth Division.—ss.

I, Angus McBride, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify that the foregoing, consisting of 95 pages, numbered from 1 to 95 inclusive, constitutes a full, true and correct transcript of the record on writ of error in cause No. 1878, entitled: Julius Rahmstorf, Plaintiff, vs. M. P. Fleischman, Defendant, wherein M. P. Fleischman is Plaintiff in Error and Julius Rahmstorf is Defendant in Error, and was made pursuant to and in accordance with the praecipe of the Plaintiff in Error, filed in this action and made a part of this transcript, and by virtue of the citation issued in said cause, and is the return thereof in accordance therewith; and I further certify that this transcript of record was printed under and by virtue of and in compliance with a "Rule for Printing Records on Appeal or Writ of Error," made by this Court on the 21st day of March, 1914, and that said transcript of record was indexed by me pursuant to said rule, and that the index thereof, consisting of pages i to iii, is

a correct index of said transcript of record; also that the costs of preparing said transcript and this certificate, amounting to twenty-nine dollars and seventy cents ($29.70), has been paid to me by counsel for Plaintiff in Error in said action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said court, this 5th day of February, 1915.

(Court)
(Seal)

ANGUS McBRIDE,
Clerk District Court,
Territory of Alaska,
Fourth Division.

No. 2574

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

M. P. FLEISCHMAN,
Plaintiff in Error,

VS.

JULIUS RAHMSTORF,
Defendant in Error.

Upon Writ of Error to the District Court for the Territory of Alaska, Fourth Judicial Division.

BRIEF OF PLAINTIFF IN ERROR.

JAMES J. CROSSLEY and
L. R. GILLETTE,
Attorneys for Plaintiff in Error.

Filed this.....day of....., A. D. 1915.
FRANK D. MONCKTON, Clerk,

By....., Deputy Clerk.

Times Publishing Company, Fairbanks, Alaska.

No. 2574

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

M. P. FLEISCHMAN,
Plaintiff in Error,

VS.

JULIUS RAHMSTORF,
Defendant in Error.

Upon Writ of Error to the District Court for the Territory of Alaska, Fourth Judicial Division.

BRIEF OF PLAINTIFF IN ERROR.

Statement of the Case.

This is an action for damages in the sum of $2,000.00, alleged to have been occasioned by the acts of the defendant below in accepting employment as clerk in a merchandise store at the town of Rampart, Alaska, which it is alleged was in violation of the conditions of a certain contract of the defendant below to refrain in that behalf for three years, incident to and as a part of a sale of a stock of merchandise or merchandise business from the said de-

fendant to the plaintiff below, on May 26, 1910.

For the purpose of defining the issues in the court below, the pleading may be summarized as follows:

The complaint alleges that on said May 26th, 1910, and for a long time prior thereto, M. P. Fleischman conducted a general merchandise store and business at said Rampart and was the owner of a stock of dry-goods, groceries, provisions, etc., in that connection, and on said day sold to said Julius Rahmstorf said stock **and the good will of said business;** that upon the payment for said stock by Rahmstorf the said Fleischman executed a contract in writing as follows:

"For and in consideration of the sum of One Dollar to me in hand paid by Julius Rahmstorf, of Rampart, Alaska, I, M. P. Fleischman, of Rampart, Alaska, hereby agree to the following:

"That should I resign my position as Postmaster of Rampart, Alaska, I will do so in favor of Julius Rahmstorf, providing he be eligible at the time of my resignation.

"I also agree and promise not to engage in any way in the line of general merchandise for the next three years, that is, up to May 26, 1913, inclusive, in the City of Rampart, Alaska, and should I do so, I hereby promise to forfeit the sum of Two Thousand Dollars. This last clause shall have no effect, should the said Julius Rahmstorf discontinue business before May 26, 1913"; that on or about the .....day of June, 1912, the said M. P. Fleischman, disregarding his said agreement with plaintiff, opened

a general merchandise store in said town of Rampart, Territory of Alaska, near Rahmstorf's place of business, and began to and is now conducting a like business to that referred to in said agreement in writing; that by reason of the premises plaintiff has suffered damages in the sum of two thousand dollars, no part of which has been paid by Fleischman, and that Rahmstorf has since the execution of said agreement continued in the business purchased by him from said Fleischman at said Rampart.

The plaintiff was permitted to amend his declaration at the trial by alleging that Fleischman opened up and conducted such competing business "as managing clerk of the Miner's Store," which is made one of the grounds of error herein. (See Record, pp. 4 and 55).

The answer admits that Fleischman conducted such business and owned such stock of goods, and that he sold the same—or at least the stock of goods, to Rahmstorf on May 26, 1910; but denies that he has ever opened up or conducted a like business to that referred to, or that the said Rahmstorf has suffered damages, or that Rahmstorf is still conducting the merchandise business purchased by him from Fleischman. The answer alleges affirmatively the facts of such sale, and the further defence:

1.—That at the time of the sale Fleischman's wife was seriously ill and he intended to take her to the States for treatment, but that before such plan could be carried out his wife died.

2.—That for several months after such sale,

Fleischman, at the request of Rahmstorf, was employed as clerk and salesman in Rahmstorf's store and continued as such until about September, 1910, and during all of that time was postmaster and conducted the Rampart Postoffice in said Rahmstorf's store.

3.—That about the first of June, 1910, and before he left Rampart as intended, he executed and gave to Rahmstorf the agreement declared upon, because of such intention to leave Alaska and believing the same was not enforceable.

4.—That after the death of his wife, Fleischman was without means or object in going to the States, and decided to remain in Rampart and secure employment; that on or about June 1, 1912, one F. J. Kalning opened up in Rampart a general merchandise store (known in the evidence as the Miner's Store) and sought to employ Fleischman as a clerk therein, Fleischman still being postmaster and conducting the U. S. Postoffice at Rampart in the building formerly and before the sale to Rahmstorf occupied by him as a store; that Fleischman agreed to work for Kalning as such clerk if Kalning would permit him to retain and conduct the postoffice therein, and also to retain certain agencies which he then held, which Kalning agreed to, and Fleischman accepted such clerkship at $75.00 a month.

5.—That Fleischman has never since the said sale to Rahmstorf resigned as postmaster at Rampart, nor has be opened up, owned or conducted except as such clerk any merchandise business at Rampart, nor has

he as such clerk of Kalning sought to divert or alienate merchandise trade from said Rahmstorf.

6.—That said agreement of May 26, 1910, being made separate and apart from such sale, and on a separate consideration, was and is without sufficient considertion and void. (Record, pp. 9 to 12).

The reply denies generally the affirmative matter of the answer, and further alleges as inducement for the execution of May 26, 1910, "that on or about the 26th day of May, 1910, the defendant came to the plaintiff and as an inducement of entering into negotiations for the sale of his business to plaintiff, informed plaintiff that he would leave Alaska and go Outside and stay there, and before leaving Alaska he would turn over to plaintiff the postoffice then being conducted by him, as well as the agency of the North American Transportation & Trading Company, then held by him" (Record, p. 13); that Fleischman continued in Rahmstorf's employ as clerk until February or March, 1911, and during the period between May 26, 1910, and that date continued as postmaster at Rampart and conducted the postoffice in said Rahmstorf's store (Record, p. 14); and further, that the purchase price for the said stock of dry-goods, etc., sold by Fleischman to Rahmstorf on May 26, 1910, was the consideration for the sale of said stock and merchandise business and the good-will thereof and for the defendant executing said agreement (Record, p. 15).

Upon the issues thus joined the defendant in the court below demurred and moved for judgment on

the pleadings, and the ruling of the lower court upon such demurrer and motion is assigned as error. (See Record, pp. 26, 27, and 83). The question of the form of the action and state of pleadings was again urged before the taking of testimony (Record, p. 29), and the ruling of the court thereon is assigned as error (Record, p. 83).

There were some informal matters in the answer, for instance, the allegation that Fleischman executed said contract believing the same could not be enforced, which resulted from the fact that the answer was drawn by Fleischman's counsel at Fairbanks and sent to Rampart for signature, and that in Fleischman's hurry to get the answer executed and returned in the mail for filing at Fairbanks he failed to cross out such matters. (Record, p. 49).

The case was tried to the Court without a jury, resulting in the entry of a judgment against the said M. P. Fleischman on March 9, 1914, wherein it is considered, ordered and adjudged that "Julius Rahmstorf do have and recover of and from the defendant, M. P. Fleischman, the sum of Two Thousand Dollars ($2,000)" **damages,** etc. It is to reverse this judgment that plaintiff in error is now here, and or that purpose we rely upon the following Assignments:

I.

That the District Court for the Territory of Alaska, Fourth Judicial Division, erred in overruling the demurrer of the defendant and plaintiff in error to the original complaint and reply filed in said cause.

II.

That the said court erred in denying the motion of defendant and plaintiff in error for judgment upon the pleadings as settled in said cause.

III.

That the said court erred in permitting the plaintiff (defendant in error) to introduce evidence in support of his said complaint and reply, because the same are insufficient in law to entitle said plaintiff (defendant in error) to the relief demanded or any relief, or to constitute a cause of action against the defendant (plaintiff in error).

IV.

That the said court erred in permitting the plaintiff (defendant in error) to introduce, and in receiving in evidence the purported contract or agreement marked "Plaintiff's Exhibit A," as follows:

"For and in consideration of the sum of one dollar to me in hand paid by Julius Rahmstorf, of Rampart, Alaska, I. M. P. Fleischman hereby agree as follows That should I resign my position as postmaster of Rampart, Alaska, I will do so in favor of Julius Rahmstorf, provided he be eligible at the time of my resignation. I also hereby agree and promise not to engage in any way in the line of general merchandise for the next three years, that is, up to May 26, 1913, inclusive, in the city of Rampart, Alaska; and should I do so, I hereby promise to forfeit the sum of two thousand dollars. This last clause shall have no effect should said Julius Rahmstorf dis-

continue business before May 26, 1913.

"M. P. FLEISCHMAN.

"Signed in the presence of

"F. J. KALNING.

"Dated at Rampart, Alaska, May 26, 1910."

over the objection of the defendant (plaintiff in error) that the same was irrelevant, incompetent, and immaterial, not sufficient in law as a basis of an action of this kind, and because the pleadings show that it was not incident to the sale of the business or stock of merchandise by Fleischman to Rahmstorf, but incident to a contract over the postoffice—a separate agreement from the sale altogether as testified to by said Rahmstorf.

V.

The said court erred in permitting the plaintiff (defendant in error) to introduce, and in receiving in evidence the receipt marked "Plaintiff's Exhibit "B," as follows:

"Rampart, Alaska, 5-26-10. Received from Julius Rahmstorf seventeen hundred ninety-one 15-100 Dollars ($1791.15) for a stock of merchandise, as payment in full.

"M. P. FLEISCHMAN."

over the objection of the defendant (plaintiff in error) as set forth in Assignment of Error IV.

VI.

The said court erred in permitting the said Julius Rahmstorf to testify generally as to damages in answer to the following question of his counsel: "Q. Have you been damaged by the fact that this

store was opened up there?" (Meaning the Miner's Store of F. J. Kalning wherein said Fleischman was employed as clerk in said Rampart Alaska from and after about June 1, 1912, which said employment constitutes the sole alleged breach of said agreement of May 26, 1910); over the objection of counsel for defendant below that the same was irrelevant, incompetent and immaterial and called for the conclusion of the witness, and said witness should be required to state the facts from which the court could reach a conclusion, on the question of damages.

VII.

The said court erred in permitting the said Julius Rahmstorf to testify as to the matter outside the expressed substance of said claimed agreement "Plaintiff's Exhibit A," in answer to the following question of his counsel as follows: "Q. Were the terms of this agreement, Plaintiff's Exhibit A discussed during the transaction?" over the objection of the defendant that the same was irrelevant, incompetent and immaterial, the agreement declared upon being in writing and not ambiguous on its face.

VIII

The said court erred in denying the motion of the defendant below, made at the point when the plaintiff below had rested his case in chief, for judgment in favor of said defendant upon the pleadings and the evidence then before the said court, on the ground generally that said plaintiff had entirely failed to prove his case, for the reasons (1) that the evidence of said plaintiff shows that the agreement, Plaintiff's

Exhibit A was induced by the proviso therein as to the post-office at Rampart and the promise of the agency of the N. A. T. & T. Company, and not by the sale of the Fleischman stock of merchandise; (2), further that the contract for the purchase of the Fleischman stock was consummated some time in April, 1910, but before May, 1910, and the said agreement of May 26, 1910 was therefore separate and apart from said sale and on a separate consideration; (3) that even if said agreemnet of May 26, 1910, be considered valid and binding, the evidence fails to show that the defendant has violated the same, and (4) while plaintiff testifies he has been damaged in his business from June 1, 1912 to May 26, 1913 for more than the amount specified in said agreement of May 26, 1910 there is no evidence to show of what such damage consists, or what amount of business the plaintiff did prior and subsequent to said alleged breach, or that any loss of business claimed was attributable to the acts of the said defendant.

IX.

The court erred in its decision, upon the motion mentioned in Assignment No. VIII, by which the defendant was compelled to introduce evidence after failure of proof on the part of the said plaintiff.

X.

The court erred in sustaining the objection of the plaintiff below propounded by the said defendant to the witness Julius Rahmstorf when called as a witness on behalf of the said defendant, as follows: "Q. What merchandise license did you pay for the

year 1912?" said witness already having testified that he paid such license under the laws of Alaska for the year 1911 on the basis of from $10,000 to $20,000 annual business, and the purpose of said question being to show by the answer of said witness that he paid the Alaska license on his said business at Rampart for the year 1912 and 1913 at the same rate as for 1911, showing that it was untrue that said plaintiff had been damaged by the alleged acts of the defendant.

XI.

The said court further erred, in connection with the error last before assigned, in ruling and deciding upon the right of the parties as to the introduction of evidence, as follows:

"Mr. Gillette): This is a damage suit,—

(The Court,: It is an action for damages, and the damages are fixed by the terms of the contract.

(Mr. Gillette): Does the Court hold that the plaintiff must not show damages even under that contract?

(The Court): I think, if the plaintiff is entitled to damages, that they are fixed by that contract," to which said decision the defendant below then and there excepted.

XII.

The said court erred in excluding from evidence and denying the offer of defendant below to prove, (a) that the merchandise license required under the laws of Alaska for the Miner's Store at Rampart Alaska (the store in which Fleischman was employed

as clerk which constitutes the sole alleged ground of breach of said contract Plaintiff's Exhibit A) for the years June 1, 1912 to and including the year 1913 and to the date of the trial in 1914 were paid for and taken out in the name of F. J. Kalning, as proving or tending to prove the issue on behalf of said defendant; and (b) that the merchandise license required under the laws of Alaska for the years 1911, 1912 and to the time of said trial for the store of said Julius Rahmstorf at Rampart Alaska, which business is the alleged object of the damages claimed, were taken out and paid for by said Rahmstorf at the same statutory schedule rate after the alleged damage as before, which proves or tends to prove that it is not true as testified by said Rahmstorf that his business decreased fifty per cent or more after Fleischman began clerking in said Miner's store.

XIII.

The court erred in excluding the evidence called for by, and in sustaining the objection of the plaintiff below to the following question propounded to the said defendant while on the stand in his own behalf, as follows:

"Q. I will ask you to state whether your acts, in your working for the Kalning store as you have testified, ever in any manner damaged the plaintiff in this action?

(Mr. Erwin): We object to that as calling for a conclusion of the witness, which is a matter for the court to determine," and especially was such ruling error since the court had, over the objection of said

defendant, permitted said plaintiff to state generally and without producing the best evidence in the way of books of account &c, that the acts of said Fleischman in clerking in the Miner's Store had damaged him (Rahmstorf) in more than fifty per cent. of his sales.

XIV.

The said court erred in permitting plaintiff below, at the conclusion of the evidence, to amend paragraph four of his complaint by inserting at the end thereof the words "as managing clerk of the Miner's Store at Rampart," over the objection of the said defendant that such amendment so changed the issues as to constitute a violation of the laws of Alaska relating to amendments of pleadings, and to injure the substantial rights of the refendant.

XV.

The said court erred in overruling the motion of the said defendant made at the conclusion of the evidence, for judgment upon the pleadings and the evidence then before the court.

XVI.

The said court erred in refusing to make and enter in said court and cause, the special findings, conclusions and judgment propounded on behalf of said defendant.

XVII.

The said court erred in overruling the objections of said defendant to the proposed findings; conclusions on behalf of said plaintiff and against said defendant, and in making and entering the same, for

the reasons set forth in said objections of defendant and others appearing upon the face of the proceedings.

XVIII.

The said court erred in its decision and ruling upon the motion for a new trial made by the said defendant (which said decision is set forth at length in the record herewith, and especially holding thereby, on the question reserved for argument after trial, that the said contract "Plaintiff's Exhibit A" provided for measured or liquidated damages instead as for penalty as therein provided, and in entering judgment for the plaintiff below for the sum of $2000.00 damages without any proof thereof or opportunity on behalf of said defendant to show to the contrary.

ARGUMENT, POINTS, AND AUTHORITIES.

1.—**On the Facts:**

In order that we may have the premises for the law hereinafter to be applied, let it first be determined from the record:

What, When, and Under What Circumstances, Was the Sale in Question Made?

1. As determinative of the nature of the sale, the receipt offered in evidence and received on behalf of the plaintiff below as "Exhibit B" speaks fully and finally:

"Rampart Alaska, 5-26-10. Received from Julius Rahmstorf seventeen hundred ninety-one 15-100 Dol-

lars ($1791.15) for a stock of merchandise, as payment in full. M. P. FLEISCHMAN."
(Record, p. 33.)

2. As to the date of the sale, Mr. Rahmstorf states: "It is impossible for me to state the exact date of this agreement, it may have been in April—it was prior to May. We agreed upon the amount—prices at which the goods should be taken over." (Record, p. 30.) "We then, on May 19th, commenced moving his stock to the building which I now occupy —I rented in the meantime from him—belonging to the N. A. T. & T. Company. He moved his stock in there and invoiced it, and ascertained the prices as near as we could, which occupied several days." (Record, p. 31.) "As to the date when the sale took place, as I recollect Fleischman commenced moving his stock on the 19th of May, 1910; it took probably two or three days to move them. They were moved on the 19th, 20th and 21st of May; it is a question whether they were my goods as soon as they were moved into my store. In my opinion they were not until I had paid for them." (Record, p. 36.)

Mr. Fleischman testifies (Record, p. 44): "As soon as I sold to Rahmstorf, about May 20th, 1910, we started to take inventory and move the stock about May 21st, the day the sale was made." "I started to collect rent from Rahmstorf on May 26, 1910, on which date I think we finished the inventory and figured up what was coming to me on the stock of goods." (Record, p. 45.)

3. As to the circumstances under which the sale

was made, there is but one material variance in the testimony of the two parties (and the truth must be determined from their testimony alone, aided only by the circumstances proved), and that is as to whether the alleged contract to refrain (Plaintiff's Exhibit "A," Record, p. 32) was a part of or in any manner entered into the matter of the sale of the stock of goods.

Naturally, the plaintiff below having alleged that the contract to refrain was a part of the consideration for the sale, he tried to prove it and, as we believe we will be able to show, warped the facts to meet that end. He says: "About May, 1910, I had some negotiations with defendant Fleischman. He appeared several times prior to that in my store and made me a proposition to take over his **general merchandise,** stating he was going to leave the country if I was willing to buy him out. I at first refused, the conditions at Rampart not being very good. But he came around again and made me the further inducement that he was going to turn the post office over to me, provided I would be appointed, of course, and also the agency of the N. A. T. & T. Company. * * * I also told him outside of the store building, in a case like this, he would have to make a contract that he was going to leave the country, or that he was not going to conduct any business; which, of course, he said it was thoroughly understood that he was going to leave Alaska anyway." (Record, pp. 30, 31.)

On the same subject Mr. Fleischman testifies: "Mr. Rahmstorf asked me on the 26th of May, or after

that—I don't remember just when it was—if I would have any objection to making such an agreement." (Record, p. 45.) "I think it was the 26th of May. Not before this; it might have been after, after the goods were all sold to Mr. Rahmstorf, Mr. Rahmstorf asked me if I would have any objection to giving him an agreement that I would not enter into business any more for three years. * * * There was nothing ever spoken about an agreement before the 26th of May. It was made up after the 26th, after the goods were sold and in Mr. Rahmstorf's possession." '(Record, p. 47.)

Rahmstorf shows himself by the record to be a shrewd business man; he is not that happy-go-lucky sort indigenous to the Far North, otherwise he would not have conceived the idea of getting a contract to refrain out of Fleischman before he left the country. Consequently, if it were true that the contract to refrain were a part of the original negotiations, is it not natural that he would have had the same reduced to writing at that time, or, if it were deferred until the date of payment for the goods, would he not have had recited in such contract that the same was upon the whole consideration for the stock of goods and not on a separate consideration? The answer is plain. Fleischman clerked for him in his store after the sale until about February, 1911, and then he and Rahmstorf had a falling out; Fleischman criticised him for the way he conducted his business, and Rahmstorf has been criticising Fleischman ever since. (Record, p. 37.) The tacking of this so-called agree-

ment to refrain onto the sale was purely an afterthought of Rahmstorf for the purpose of oppression, and for the purpose of running Fleischman out of the community. This court may say the court below had the witnesses before it, and is presumed to have passed upon all matters of interest and credibility; but this is not true, because the lower court proceeded upon a theory entirely independent of such considerations, to-wit, that the so-called agreement to refrain was necessarily a part of the sale of the stock of goods and the sum therein named was for liquidated damages and not for penalty as therein provided. (See Opinion of Court, Record, pp. 73-4-5.)

Conceding That the So-Called Contract to Refrain Was Incident to the Sale, Was There a Breach?

1. After the sale of the stock of merchandise by Fleischman to Rahmstorf, Rahmstorf became the tenant of the N. A. T. & T. Company, for which Fleischman was agent, and it was into those premises that the Fleischman stock was moved. (Record. p. 31.) Fleischman moved the post office into said premises and was hired by Rahmstorf as clerk, conducting the post office and continuing as such clerk until about February, 1911. (Record pp. 33 and 37.)

2. At the time of the sale, the evidence shows that the wife of Fleischman, who had been Outside for medical treatment, was on her way back to Alaska, or was expected back that summer, and Fleischman intended to take his wife and leave Alaska permanently. (Testimony of Fleischman, Record, p. 48.)

Up until January, 1912 (1911), he lived with his wife in the N. A. T. & T. Company premises where Rahmstorf conducted his store. (Testimony of Rahmstorf, Record, p. 23.) He then moved his living quarters from Rahmstorf's place on account of the cold, and went with his wife to live in the store building formerly occupied by himself as a store (Record, p. 33), and there his wife died, January 30, 1912 (Record, p. 48), and on that account he remained in Alaska. (Record, p. 45.)

3. As before stated, about February, 1911, the parties had some difference of opinion as to the conduct of Rahmstorf's business and Fleischman discontinued his clerkship for Rahmstorf and moved his post office business to his former store building, still continuing as postmaster at Rampart, and still retaining the agency of the N. A. T. & T. Company at Rampart, and as such collecting rent from Rahmstorf. In the summer of 1911 he took a trip to Iditarod, where he had mining interests, and returned to Rampart and lived with his wife in his own premises nutil her death, January 30, 1912 (Testimony of Fleischman, Record, p. 44), and otherwise, between February, 1911, and June 1, 1912, he was doing nothing except run the post office (Id.). So in the very nature of things, it cannot be true as testified by Rahmstorf (Record, pp. 33-4) that soon after his wife died Fleischman began "fixing up, replacing shelves, counters, etc.," in his own place of business. There is a year intervening for which Rahmstorf, doubtless from lapse of memory, fails to account.

4. Then comes the controversy as to the circumstances and nature of the employment of Fleischman beginning about June 1, 1912, in the Miner's or F. J. Kalning store at Rampart. In this the issue on the facts is substantially as follows:

a. Rahmstorf claims that in the latter part of May, 1912, Fleischman went to Tanana and purchased a small stock of groceries and landed them at the premises occupied by him as a store prior to May 26, 1910, and that he opened up and conducted a business consisting in the main part of groceries only, as the Miner's store. (Record, pp. 34-35). That while Fleischman claims that F. J. Kalning opened up and owned such business, and that Rahmstorf did considerable business with that store and always made out bills against it in the name of F. J. Kalning or the Miner's Store, he Rahmstorf considered that Fleischman owned and conducted the business, but he could not swear that that was true. (Testimony of Rahmstorf, p. 35; Exhibits 1 and 2, Record pp. 22-3-4-5.) To substantiate this theory he produced some expense bills against M. P. Fleischman attached to the record as Exhibit "C," (Record, pp. 17, 18, 19, 20 and 21.)

b. Fleischman, on the contrary states that on and after June 1, 1912, he kept a very accurate system of books and papers for the said F. J. Kalning as his clerk; that he was careful that any little item billed to himself was corrected because he had heard that Rahmstorf had threatened to sue him; that sometimes he ordered goods for the Kalning store and

sometimes Kalning did; that he, Fleischman, did part of the correspondence and signed Kalning's name by himself; that he did not open up any business at Rampart; that he went to Tanana and ordered the goods for Kalning represented by Defendant's Exhibits 1 and 2; and that he had the care, custody and management of the business when Kalning happened to be absent, only as clerk and **"the same as I did when I was clerking for Rahmstorf,"** (Record pp. 49, 50.) and that Rahmstorf never complained to him personally about his (Fleischman's) connection with the Kalning or Miner's Store. (Record p. 51.) Also that he secured corrected expense bills (except as to talking machines) for those made out against him and represented by said Exhibit "C," (Record p. 46), and that he never endeavored to draw off any of the trade or customers of Julius Rahmstorf (Record p. 47), this last statement being corroborated by Rahmstorf (Record, p. 36.) Witness W. B. Ballou testified that F. J. Kalning had been in the mercantile business at Rampart for two years prior to the trial, in the store where Fleischman conducted the postoffice, which is known as the Miner's Store, (Record p. 52,) and to like effect is the testimony of witness John W. Duncan (Record pp. 53, 54.)

This being the state of the evidence as to Fleischman's employment subsequent to the execution of the so-called contract to refrain, and the same having been palpably disregarded by the lower court because of the erroneous theory on which it proceeded to render judgment, what conclusion must this court

adopt upon a consideration of the same? We claim the conclusion is inevitable,

1. That if the co-called contract to refrain (or, as the court below held, for a sale of the good-will of the business) were to be strictly construed according to the theory of the court below, Rahmstorf himself caused the first breach thereof by employing Fleischman as a clerk in his own store; that afterwards, when he and Fleischman disagreed and Fleischman left his employ he arbitrarily denied Fleischman the privilege of accepting employment elsewhere in any capacity for the reason, as he states in his amended reply (Record, p. 13) that Fleischman had agreed to leave Alaska and go outside and stay there.

2. That in truth and in fact Fleischman never did open up or conduct, either as managing clerk or otherwise, the said F. J. Kalning or Miner's Store.

3. That no ulterior interest on the part of Fleischman in the Miner's Store business can be presumed under the pleadings or the facts proved, but that, on the contrary, it being shown that Fleischman avoided even the appearance of evil by withholding his own name or credit from the business, and merely clerking in the store as an incident to his postmastership at Rampart, he must be held to have been within his rights in accepting such employment, even should the contract, Exhibit A, be considered to have passed the good will of the stock of merchandise.

Conceding That the So-Called Contract "Exhibit A" Is Valid, What Damages Were Contemplated By the Parties in Case of a Breach?

The sale was of a stock of merchandise (See Exhibit B, Record p. 33,) not of a business. The stock consisted of a little of everything in the line of general merchandise needed in a mining camp, such as groceries, hardware, drygoods, shoes, and some lumber. (Testimony of Rahmstorf, Record p. 33.) Most of the goods were sold at cost price, and some which were considered dead stock were sold at greatly reduced prices, such as hardware and dry goods, (Id. Record, p. 37,) they were moved from the **situs** and premises where they were theretofore being sold, and installed in the store of Rahmstorf and commingled with goods already there, in premises of which he was the tenant of Fleischman, as heretofore shown.

By the terms of the sale, therefore, Rahmstorf had secured the first and primary benefits inhering in the transaction. In the very nature of things, he could not claim, and he did not claim, the benefit of an established **situs** from Fleischman, nor of an established business or the incidents thereof in the way of books of accounts receivable, the continuance of custom, and the other incidents of good-will defined by the Supreme Court of the United States as follows:

> "Undoubtedly good-will is, in many cases, a valuable thing, although there is difficulty in de-

> ciding accurately what is included under the term. It is tangible only as an incident, as connected with, a going concern or business having locality or name, and is not susceptible of being disposed of independently. Mr. Justice Story defined good-will to be: The advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or even from ancient partiality or prejudice."
>
> Metropolitan Bank vs. St. Louis Dispatch, 149 U. S., 446, affirming s. c. 36 Fed. 724.

By a simple process of elimination made inevitable by the facts of this case, therefore, there was, after the sale in question, nothing left as subject of contract between the parties but a doubtful right of Rahmstorf to succeed Fleischman as postmaster at Rampart and as agent of the N. A. T. & T. Company, and a bare agreement "not to engage in any way in the line of general merchandise." (Testimony Rahmstorf, Record p. 30; Exhibit A, p. 32; Testimony Fleischman, pp. 45-6 and 48).

It is doubtless true, as Fleischman states (Record p. 48), that the mere fact of the post-office being situated in a store at Rampart diverted business to it and was a "drawing card" for that purpose—this is

not denied by Rahmstorf; and this fact furnishes the true motive for putting that in the agreement Exhibit A. How much value did the parties attach to this so-called covenant, and what if any part of such value does the so-called forfeit sum of $2000.00 cover? On this the record, other than the bare words of the agreement, is silent.

The terms of the provision as to refraining from business were interpreted by Rahmstorf himself to apply to "opening up and conducting" a merchandise business (Testimony of Rahmstorf, Record, pp. 34, 55), and his theory is adopted by the pleadings and evidence generally. Such is presumed, then, to have been in contemplation of the parties at the time the agreement was signed. We think it amply sustained by the record that Fleischman did not open up or conduct the business of the F. J. Kalning or Miner's Store, but that he was a mere clerk or salesman therein; that his position was identical with that occupied by him in Rahmstorf's store, where he certainly was not manager, because he was discharged upon the first conflict as to management; and that Fleischman was justified, under the strictest interpretation of his agreement, in believing that Rahmstorf could not and would not complain if he, Fleischman, accepted like employment elsewhere.

There is not a scintilla of evidence in the record to disclose what elements of damage entered into the sum agreed to be forfeited as penalty, or that the minds of the parties met upon or measured any sum as the natural or probable consequences of a

breach. All that was agreed upon was, that such an agreement would be executed by Fleischman before he left Alaska, and the sum of $2000 must therefore have been arbitrarily inserted as an indication that Fleischman would pay any sum that Rahmstorf should in future show as damages for a breach. (Testimony of Rahmstorf, Record, pp. 30, 31, 37; Fleischman, pp. 44-48; Assignments of Error IV, VIII, XI, XVI, XVII and XVIII). Such sum could not, either in law or in equity, be considered as commensurate and just upon a sale involving in the first instance only $1791.15!

II.—**Upon the Law:**

1. **As to Assignments of Error I, II and III, and VIII. Ruling on Demurrer and Motion for Judgment on Pleadings and Evidence:**

In his complaint and amended reply the plaintiff below sues upon a cause of action for the recovery of general damages for the breach of contract providing for penalty, and prays for the recovery of liquidated damages. The agreement declared upon '(Amended Reply, pp. 14-15) and the allegations of the complaint (Record, p. 4) show that the sum named was to be forfeited upon certain contingencies, and was therefore but a promise to pay. (See Summons, Record, p. 6.)

The general rule as to liquidated damages is not applicable to contracts for the payment of money alone; in such cases the courts construe the damages as penalty. (13 Cyc., 101.) Of course it is alleged

that the sum stipulated to be paid was incident or ancilliary to a sale; but the terms of the instrument sued on show to the contrary, and such allegation was not established by any competent testimony on the main case of plaintiff below, nor, as we contend, at all.

In fact, all testimony introduced by the plaintiff below, being subjected to our general exception to the taking of testimony at all under the form and allegations of the pleadings (Record, p. 29), was incompetent as far as it sought to establish facts contrary to or to modify or change the terms expressed in said Exhibit A, sued upon. The demurrer admitted only facts well pleaded in the declaration, and only competent testimony on the trial. The only matter in the case admitted by the plaintiff in error sufficient to become evidentiary, is the execution of the agreement to turn over the postoffice at Rampart to the opposite party and refrain from a competing business.

It may be urged that the plaintiff in error lost the benefit of his demurrer by answering; but that cannot be, since the same deformity of the complaint is carried into the reply, and we revived the demurrer before the taking of evidence and at the close of the evidence in chief. If this was not the proper method the defendant in error did not move to have aught done for its correction, and the lower court passed upon the merits. (Record, pp. 27, 29, 40, 56.)

2. **As to Assignments of Error IV, V, VI, VII, X, XI, XII, XIII and XIV. Upon the Admission and Rejection of Evidence:**

A. As to the point raised by Assignment IV, we admit that if plaintiff below had sought recovery under the contract of only such damages as were shown to have been sustained, the objection would not be good; but since the form of the action was for general damages, and the recovery sought for was special, measured and liquidated damages, we were met with that difficulty that, even were the evidence favorable to us under a proper declaration and prayer, it became wholly incompetent and immaterial under the views of the lower court on demurrer.

The same observation will apply to said Exhibit B, referred to in Assignment V. But for the ambiguous nature of the action, that would have been one of our most valuable items of evidence to show the nature and scope of the sale of goods. We are in the position of having waived the benefits of Assignments IV and V, save as to the demurrer and motions hereinbefore referred to.

B. Assignments VI, VII, X, XI, XII and XIII go to the very gist of the whole matter, and for that reason we feel justified in giving to them a more extended analysis. For that purpose, and because they all involve the vital principle for this court's decision, we feel justified in having grouped those six assignments practically as one, incidentally calling attention to the principles or decisions applicable to each.

First: The complaint alleges (Record, p. 5) "That

by reason of the premises plaintiff has suffered damage in the sum of two thousand dollars, no part of which sum has been paid to plaintiff by defendant"; this is denied generally by the answer (Record p. 8), and specially and affirmatively by paragraph V (Record p. 11). The lower court held that under this issue, it was not incumbent upon the plaintiff to offer proof of damage, because of the **implied** terms of the agreement declared upon. (See Record, p. 42; Proposed Findings and Conclusions, pp. 57-61; Conclusion of Law III, p. 68; Opinion of Lower Court, pp. 73-75.) The agreement was not sufficient on its face to sustain the recovery, and required proof extraneous and independent in order to sustain it even as a bond for penalty in case of breach; and this the law does not countenance in an action of this nature, because where the contract sued on is incorporated as a part of the pleading, it is to be treated as a controlling part thereof. (Arnold v. Scharbauer, 116 Fed. at p. 495.) Even if the contract was doubtful in meaning, it was the duty of the court to construe it so as not to give one party an unfair advantage over the other and so to avoid a forfeiture. (9 Cyc., 587.)

Second: We come, then, to a consideration of the underlying error which induced the judgment in this case, viz: that committed by the lower court in holding the agreement Exhibit A (a) to have been a part of some other transaction, and (b) that the terms of the contract or agreement Exhibit A, as to the damages contemplated by the parties were not controlling in the case.

The lower court relies for this result upon the case of Sun Printing Co. vs. Moore, 185 U. S. 642; 46 L. Ed., 366, upon a correct construction of which we feel the judgment should be reversed. That decision does not hold as did the lower court in this case, that

> "It is true, as contended by Fleischman, that the word "forfeit" in the contract would ordinarily indicate penalty rather than liquidated damages; but the courts hold universally at the present time that the language used in such a contract is not controlling; that the court will look at the whole contract and the purposes for which it was entered into for its meaning, rather than to the language used by the parties." (Opinion, Record, p. 73.)

The ruling of the Supreme Court of the United States is diametrically to the contrary, as we will proceed to show. In that case, the charter party defended against specifically liquidated the damages at the sum of $75,000.00 in these words:

> "That for the purpose of this charter, the value of the yacht shall be considered and taken at the sum of seventy-five thousand dollars ($75,,-000.00), and the said hirer shall procure surety or guarantee to and for the owner in the sum of seventy-five thousand dollars ($75,000.00), to secure any and all losses and damages which may occur to said boat or its belongings, which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of

> the terms or conditions of this contract. * * * That we expressly waive and dispense with notice of any demand, suit, or action at law against the hirer, and expressly waive any and all notice of nonperformance of the terms of said annexed agreement on the part of the hirer to be kept and performed; * * * that our liability hereunto shall in no case exceed the sum of seventy-five thousands dollars ($75,000.00)."

It thus appears that the damages for non-delivery of the ship were estimated by the parties before signing the contract; they were measured, in fact—liquidated. Supposing in that contract the printing company had merely said: "In consideration of one dollar and of a certain charter party, etc., we agree to return said yacht at a certain time, and should we fail so to do we promise to forfeit the sum of $75,000.00;" there also being independent covenants in the contract covered by such penalty—would the learned Chief Justice have construed the sum to have been measured and liquidated? Clearly not, under the principles enunciated by the Supreme Court of the United States on the subject since very early times, and as digested beginning on page 378 of the Law Edition, where the court lays down the following as a statement of the controlling principle as gathered from the case of Van Buren vs. Digges, 11 How., 461 (13 L. Ed. 771):

> "The clause of the contract providing for the forfeiture of 10 per centum on the amount of the contract price, upon failure to complete the work

by a given day, cannot properly be regarded as an agreement or settlement of liquidated damages. The term 'forfeiture' imports a penalty; it has no necessary or natural connection with the measure or degree of injury which may result from a breach of contract, or from an imperfect performance. It implies an absolute infliction regardless or the nature and extent of the causes by which it is superinduced. Unless, therefore, it shall have been expressly **adopted** and **declared** by the parties to be a measure of injury or compensation, it is never taken as such by courts of justice, who leave it to be enforced where this can be done in its real character, viz: that of a penalty."

See also:

Quinn v. United States, 99 U. S., 30; 25 L. Ed., 269;

Clark v. Barnard, 108 U. S., 436; 27 L. Ed., 780;

Watts v. Camors, 115 U. S., 353; 29 L. Ed., 406;

Bignall v. Gould, 119 U. S., 495; 30 L. Ed., 491;

Tayloe v. Sandiford, 7 Wheat., 13; 5 L. Ed., 384.

And quoting from some well-selected English cases the court says further (46 L. Ed., 379):

There is no doubt that where the doing of any particular act is secured by a penalty, a court of equity is anxious to treat the penalty as being merely a mode of securing the due performance of the act contracted to be done, and not as a sum of money really intended to be paid. (Ranger v. Great Western R.

Co.; 5 H. L. Cas. at p. 94). Further: The five thousand pounds is expressly declared by the covenant to be as and by way of liquidated damages, and not as penalty. It is a sum named in respect of the breach of this one covenant only, and the intention of the parties is clear and unequivocal. The courts have indeed held in some cases the words 'liquidated damages' are not to be taken according to their obvious meaning; but these cases are all where the doing or omitting to do several things of various degrees of importance is secured by the sum named, and, notwithstanding the language used, it is plain from the whole instrument the real intention was different. (Price v. Green, 16 Mees. & W., at p. 354). And then, summing up the substance of the leading State decisions, the court proceeds to this conclusion:

> "The law does not limit an owner of property, in his dealings with private individuals respecting such property, from affixing his own estimate of its value upon a sale thereof, or, on being solicited, to place the property at hazard by delivering it into the custody of another for employment in a perilous adventure. If the would-be buyer or lessee is of the opinion that the value affixed to the property is exorbitant he is at liberty to refuse to enter into a contract for its acquisition. But if he does contract, and has induced the owner to part with his property on the faith of stipulations as to value, the purchaser or hirer, in the absence of fraud, should not have the aid of a court of equity or of law to reduce

> the agreed value to a sum which others may deem is the actual value. * * * As the stipulation for value referred to was binding upon the parties, the trial court rightly refused to consider evidence tending to show that the admitted value was excessive." (45 L. Ed., at p. 382).

And it is upon this conclusion that the trial court in the case at bar held that the agreement (Exhibit A), in which the sum named is for penalty or to be forfeited, was not really such, but was for measured and liquidated damages!

C. The plaintiff in the court below must have felt very uncertain as to his position, because in his complaint he even omitted the nominal consideration named in the agreement (Exhibit A), and injected a consideration **aliunde** the terms thereof—a sale which was independent and past. And then it was sought to bolster his position by stating as a mere conclusion that he had suffered actual damage. He states over objection (Record, p. 34): "I have been damaged—the sales decreased quite heavy, at least fifty per cent. I lost a good many customers." Again (Record, p. 36): "I have been damaged to a far greater extent than the sum stipulated in the agreement, through loss of trade. I never knew of Fleischman taking any of my customers in a direct way. My complaint is that that store, to which I rendered bills as the Miner's Store, has entered into competition with me and got a part of the trade in Rampart."

Were, then, the damages of such a nature as to be incapable of estimation or proof? The plaintiff be-

low says not. Then the court should have refused to receive his conclusion and required proof from his books of account or other competent evidence of the loss, and further proof that such loss was due to the acts of Fleischman. This is what is required, and no less is required, by the judgment of the Supreme Court of the United States in the Sun Printing Co. case, and it was incumbent upon the plaintiff below, and not upon his adversary, to put such matters in proof of his main case.

Evans v. Moseley, (Kan.) 114 Pac., 374; 50 L. R. A. (N. S.), 889.

In the case just cited, the decisions are exhaustively collated in the note to the L. R. A., and afford an instructive treatise on the question here in issue; and the court, after a review of the cases of Van Buren v. Digges and Sun Printing Co. v. Moore, **supra,** and many others, announces this doctrine (pp. 897-8, 50 L. R. A.):

> "We think it may fairly be said that, while ordinarily parties are bound by the terms of their contracts, still the courts have an idea that they are constituted to do justice, and unless it appears that the parties bona fide and actually intended to stipulate for liquidated damages, which damages would often be grossly inequitable and unjust, they will be presumed by the courts to have intended that which is just and equitable,—a mere penalty; and especially so where the language used is susceptible of either construction, or where it is plain that actual damages

> might without serious difficulty have been estimated in advance, or where the sum agreed upon would be recoverable alike for a partial or for a total breach."

And while there were other questions in that case, the same was reversed and remanded for a new trial as to the amount of damages only.

D. It then becomes pertinent to inquire if the question was sufficiently raised at or before the trial, or so as to give the lower court opportunity to correct the error. We think a brief reference to the record will serve to answer that question in the affirmative. The exception arose upon our offer to prove the contrary of Rahmstorf's statement of actual damages on Record, pp. 36 and 34, (See Record, p. 42; Assignments vi, viii, x, and xi), and upon our offer to prove in the record, p. 43, and the question and answer (Record p. 51), referred to in Assignment XIII. The question was further reserved on the motion for new trial (Record, pp. 69, 70, 71 and 72), and while perhaps the ruling on the motion for new trial may not constitute reversible error, this Court will look to that ruling and consider the same for the purpose of ascertaining the grounds of other errors assigned which do not appear at large elsewhere in the record. Well might the lower Court observe:

> "Even if this contract should be construed as containing provisions for penalty rather than liquidated damages, the result might not have been different because, as testified by the plain-

tiff, the damages he actually sustained exceeded this amount. Of course the testimony was limited, **so the truth of this statement wasn't admitted, and the cross-examination was restricted on that point. There would have been error, of course, if the contrary rule had prevailed—I mean if it were true the contract was for penalty rather than liquidated damages."** (Opinion, Record, p. 75—black face not in original.)

Might not the result have been different had Rahmstorf produced his books and attempted to show how and how much he had been damaged **by the acts of Fleischman?** Might not the result have been different if we had been permitted to show that Rahmstorf had made returns under oath for the purpose of securing a merchandise license, from which it would appear that his business had not fallen off or decreased since the opening up of the store of Kalning or Miner's Store, and that he paid the same rate under the law subsequently as he did before? The "different result" can best be inferred from the quiescence of counsel for plaintiff below when Rahmstorf was asked what merchandise license he paid for the year 1911 and he answered without objection; but when asked what it was for 1912, objection was promptly made—for that was the year the Miner's Store was opened up. (Record, p. 41). We had not the books or business of the plaintiff in our possession, and were offering matters of record which we contended, and still contend, would have gone far toward establishing the bad faith of Rahmstorf's tes-

timony. (Record, pp. 41, 42, and 43.)

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3. As to Assignment XIV.

The plaintiff below secured permission to amend his declaration by stating the Miner's Store business was opened up and conducted by Fleischman "as managing clerk," under the pretence that such amendment was conforming the pleading to the proofs. What proofs? The statement of Rahmstorf (Record, p. 34) that

> "goods were landed in this house before mentioned and it was opened up for his business, and he conducted and managed his business * * a general store, but in the main part it consisted of groceries only"?

and that "I cannot swear that Fleischman owns that business," (Record, p. 35)? And the statement of Fleischman that he never opened up or conducted any business whatever (Record, p. 49)? And the further fact tendered in proof, that F. J. Kalning had taken out the license for the Miner's Store for 1912 and 1913? And the further statements of Fleischman on cross-examination as to the nature and scope of his employment (Record, pp. 48, 49, 50 and 51)? If the purpose of the contract was to exclude Fleischman from accepting employment as a clerk, why did Rahmstorf employ him?

4—As to Assignments XV, XVI, XVII and XVIII.

The questions raised by these assignments are so interwoven with those already raised, that a separate

discussion of them is not deemed necessary here. We content ourselves with the observation that, where the restraint arising from a covenant to refrain from the pursuance of a lawful business or occupation is the main purpose of the contract, and is not ancilliary to the sale of a business or like purpose, then the courts uniformly hold such agreements to be void.

Richardson v. Buhl (Mich.) 6 L. R. A., 457; 43 N. W., 1102;

Arnot v. Coal Co. (N. Y.), 23 Am. Rep., 190;

People v. Milk Exchange (N. Y.), 27 L. R. A., 437; 39 N. E., 1062;

People v. Refining Co. (N. Y.), 5 L. R. A., 386; 7. N. Y. Supp., 406;

State v. Distilling Co. (Neb.), 46 N. W., 155;

State Etc. v. Standard Oil Co., 15 L. R. A., 145; 30 N. E., 279;

Am. Biscuit Co. v. Klotz, 44 Fed., 721;

Distilling Co. v. Maloney (Ill.), 41 N. E., 188;

Carbon Co. v. McMillan (N. Y.) 23 N. E., 530;

National Harrow Co. v. Hench, 83 Fed., 36;

Pacific Factor Co. v. Adler (Cal.), 27 Pac., 36;

Santa Clara Etc. Co. v. Hayes (Cal.), 18 Pac., 391.

Upon the whole case, therefore, we contend that the judgment should be reversed with directions that the cause be dismissed; but that, if this Court should be disposed to consider the record as to matters **aliunde** the agreement sued upon and therefrom to conclude the same were a part of the sale mentioned,

then that the cause be remanded for a trial of the issue of damages.

Respectfully submitted,

JAMES J. CROSSLEY,
L. R. GILLETTE,
Attorneys for Plaintiff in Error.

Dated Fairbanks, Alaska,
April 3rd, 1915.

No. 2574.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

M. F. FLEISCHMAN,
Plaintiff in Error,

vs.

JULIUS RAIMSTORE,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

FERNAND DE JOURNEL and
G. B. ERWIN,
Attorneys for Defendant in Error.

Filed this day of , A. D., 1915.
FRANK D. MONCKTON, Clerk,

By , Deputy Clerk.

THE SUNSET CITIES PRINTING, OAKLAND.

No. 2574.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

M. P. FLEISCHMAN,
Plaintiff in Error,

VS.

JULIUS RAHMSTORF,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Additional Statement of Facts.

M. P. Fleischman, the plaintiff in error, for a period of about twelve years, beginning in the spring of 1898 (Record p. 44) and up to the 26th day of May, 1910, was engaged in the business of dealing in and vending groceries, hardware, dry goods, shoes, talking machines, and generally everything in the line of general merchandise as needed in a mining camp (Record p. 33) at Rampart, Alaska, and some time in May, 1910 he entered into negotiations with Julius Rahmstorf, the defendant in error, to sell his said business to him, which

said negotiations were completed on the 26th day of May, 1910, when the stock was finally invoiced and the purchase price of $1791.15 paid by defendant in error and a receipt given by plaintiff in error. That at the time of payment of the purchase price and in consideration thereof and as a part of the transaction the plaintiff in error prepared, executed and delivered to the defendant in error (Record p. 31 & 48) the agreement in writing set out in full in the pleadings in this case (Record p. 14), in which the plaintiff in error, among other things, did "agree and promise not to engage in any way in the line of general merchandise for the next three years, that is up to May 26, 1913, inclusive, in the City of Rampart, Alaska, and should I do so, I hereby promise to forfeit the sum of Two Thousand Dollars. This last clause shall have no effect, should the said Julius Rahmstorf discontinue business before May 26, 1913." That from said 26th May, 1910, the defendant in error has carried on said business, for a time and up to the 1st January, 1912, employing the plaintiff in error as a clerk in the store. That on the 1st June, 1910, the plaintiff in error went personally to the town of Tanana, Alaska, and in the name of one F. J. Kalning personally selected and had shipped to Rampart, Alaska, a stock of general merchandise, hardware, etc. (See Exhibits 1 & 2, Record pp. 22, 23, 24, 25), and a few days thereafter opened a general merchandise store in

the town of Rampart about 500 feet distant from the business then being conducted by the defendant in error, and personally conducted and had general supervision of said merchandise business as managing clerk, and from that time has been so engaged in conducting a like business to that of the defendant in error. For this alleged breach of contract the defendant in error brought suit against the plaintiff in error on January 13th, 1913, for the sum of $2000.00 damages, being the sum fixed by the parties in the agreement to not engage in business in the town of Rampart.

Answering Argument.

Plaintiff in error in his brief (p. 15) tries to make the point that the sale of the stock of merchandise and business was completed some time prior to the date of the agreement not to engage in business in Rampart, and that the agreement was not part of the sale of the stock of goods.

If the sale was not made on the 26th May, 1910, at which time the parties finally finished removing the goods to the new location, completed the invoicing to ascertain the price to be paid, signed and delivered the receipt for purchase price—where in the record is there any testimony to support a finding for another and earlier date? The only testimony relied upon by plaintiff in error is as follows: (Fleischman) "As soon as I sold to Rahmstorf, about May 20, 1910, we started to take

an inventory and move the stock about May 21, the day the sale was made." (Record p. 44; Brief p. 15). This is very indefinite as it mentions two different days, May 20th and May 21st, and it also intimates that there was still something to do before the price could be ascertained. There is considerable testimony by both parties showing after negotiations were entered into that before the sale could be completed the goods would have to be moved to the new location and inventoried, and nowhere in the testimony does it appear that there was an intention upon the part of Rahmstorf, defendant in error, that title passed at any earlier date than 26th May, 1910, when the goods were invoiced and the money paid. (Record p. 36).

The general rule with regard to the passing of title is well stated in 35 Cyc. 283, and there is nothing in the record to take this question of time of passing of title out of the general rule as there laid down. There was something to be done to the goods by both the buyer and seller before title passed.

Rahmstorf says: "We then on May 19th, commenced moving his (Fleischman's) stock to the building which I now occupy * * * He moved his stock in there and invoiced it, and ascertained the prices as near as we could, which occupied several days." (Record p. 31). Fleischman, plaintiff in error, says: " * * * We started to take inventory and move the stock * * * " (Record

p. 44) which indicates that he, the seller, had something to do to the goods before title was ready to pass. And again plaintiff in error on his direct examination testifies: "I started to collect rent from Rahmstorf on May 26th, 1910, on which date I think we finished the inventory and figured up what was coming to me on the stock of goods sold to Rahmstorf." (Record p. 45). We submit that the sale of the stock of merchandise and business, including the good will, was completed, and title passed from the seller to the buyer, on May 26th, 1910, and that plaintiff in error has failed to show that it was on another and earlier day.

The Agreement Not to Engage in Like Business for Three Years Was Incidental to the Sale.

Fleischman, plaintiff in error, on direct examination testified as follows: "Mr. Rahmstorf asked me on the 26th of May, or after that, I don't remember just when it was, if I would have any objection to making such an agreement. I told him no; that I didn't think I would ever go into business again; I figured on going outside." (Record p. 45). "The circumstances with reference to my signing the contract Plaintiff's Exhibit A were: I think it was the 26th of May. Not before this; it might have been after, after the goods were all sold to Mr. Rahmstorf. Mr. Rahmstorf asked me if I would have any objection to giving him an agreement that I would not enter into business any more

for three years. I told him "No; I will give you that agreement. I am not going in business any more." This was all done in the store. There was nothing ever spoken about an agreement before the 26th of May. It was made up after the 26th, after the goods were sold and in Mr. Rahmstorf's possession." (Record p. 47). Altho plaintiff in error warps and twists his testimony in an attempt to show that the agreement might not have been written and executed until after the 26th day of May, he has not the nerve to come out strong and say positively that it was not signed on the day it bears date, and even goes so far as saying: "I think it was the 26th of May." (Record p. 47). In paragraph III of his further separate and affirmative answer and defence he alleges: "That on or about the first day of June, 1910, the defendant gave to the said Rahmstorf a paper writing in words and figures in substance and effect, as follows." (Record p. 9). However, at the trial he does not testify to this as the date, but corroborates the straight and positive testimony of defendant in error, who says: "I also told him * * he would have to make a contract that he was going to leave the country, or that he was not going to conduct any business, which, of course, he said it was thoroughly understood that he was going to leave Alaska anyway." (Record pp. 30-31). This conversation took place some time prior to 26th May, when negotiations began between the

parties. Defendant in error further says: "Then on May 26th—I already told him before that I was willing to settle with him, to pay the purchase price —on May 26th I told him to have this agreement which we made before—(objection by Mr. Gillette). He then retired to the corner which he used as a postoffice in my own place, and on his own typewriter he drew up the agreement, and signed it, and witnessed it by F. J. Kalning. After he handed me the signed agreement, I paid him the price of eighteen or nineteen hundred dollars—I don't remember exactly how much—which closed the whole transaction." (Record p. 31). Nowhere in the record is this testimony given by defendant in error, that the agreement to not engage in business was signed and delivered to him before the purchase price for the goods was paid over, disputed or denied; there is therefore nothing in the record in this case tending to bolster up plaintiff in error's contention that the agreement was not a part of and incidental to the sale of the business, but on the contrary it has been clearly shown that said agreement to not engage in business was incidental to the contract of sale and that the consideration for this agreement was the price paid for the business and good will.

Plaintiff in error, in his Brief p. 17, says that: "Rahmstorf shows himself by the record to be a shrewd business man; he is not that happy-go-lucky sort indigenous to the Far North, otherwise

he would not have conceived the idea of getting a contract to refrain out of Fleischman before he left the country." Now let us see what the attitude of plaintiff in error was at the time he signed the agreement. He says in his Answer that he "signed said paper because of his intention to leave Alaska as aforesaid, **and believing the same could not be enforced in any event.**" (Record p. 10). (Black face ours.)

What does the Circuit Court of Appeals think of a man who deliberately enters into a contract for a valuable consideration, believing at the time he does so that it can not be enforced against him, and then complains afterwards that it was done for the purpose of oppression and for the purpose of running him out of the country, (Brief p. 18) and this notwithstanding the fact that he drew the agreement himself, using his own language, on his own typewriter, without pressure or duress of any kind brought upon him by defendant in error; and further admitted on direct examination in answer to Rahmstorf's question if he had any objection to making such an agreement: "I told him No; that I didn't think I would ever go into business again; I figured on going outside." (Record p. 45). He has certainly shown his willingness to make this agreement, and there is no strength to his argument that it was separate and apart from the sale of his business.

There Was a Breach of Contract.

Plaintiff in error admits:

(1) That he was employed in Kalning's store (Miners' Store) continuously since June 1st, 1912, until May 26th, 1913, and after. (Record p. 39).

(2) He went to Tanana and purchased the goods for Kalning (Exhibits 1 & 2), and that Kalning was not along. (Record pp. 46 and 49).

(3) He did the corresponding for Kalning. (Record p. 49).

(4) He had full supervision of the store when Kalning was not there. (Record p. 50).

(5) Kalning was away from Rampart most of the time—only at the store once a week or once in two weeks (Record p. 49) until September 1912, when Kalning ceased mining operations. (Record p. 51).

(6) He had the care, custody and management of the store as clerk. (Record p. 50).

(7) Was selling the same kind of goods Rahmstorf is selling, except liquors. (Record p. 50).

(8) He ordered goods for the store in his own name. See plaintiff's Exhibit "C." (Record pp. 17 to 21).

Defendant in error, Rahmstorf, testified in substance as follows:

(a) Fleischman the defendant (plaintiff in error) is managing that store. Kalning was engaged in mining on Little Minook Creek and only

was in the store on Sundays up to fall of 1912. (Record p. 34).

(b) Fleischman always did the business; from Kalning's actions he never did any business there at all so far as I am concerned. * * * (Record p. 35).

After reading the testimony of both parties there can be no doubt but that plaintiff in error from June 1st, 1912, to September, 1912, was in sole charge of the store, the alleged owner, Kalning, during that period being engaged in mining and only coming to the store once in a week or two, and then taking no part in the business, and after closing down his mining operations Kalning seems to have acted more as a handy man, "chopping wood, carrying water, delivering goods and doing all sorts of work outside the store," (Record p. 35) leaving Fleischman, plaintiff in error, in full charge.

As to whether these acts of plaintiff in error constituted a breach of the contract, the following authorities are cited as being in point:

Canady v. Knox, 94 Pac. 652, (Wash.) where defendant was employed in some capacity in a meat market after selling his business with the good will, coupled with an agreement that "he will not enter into the butcher business, nor kill any animals for the purpose of peddling or sale of any nature, only for his own private use in the town of Almira or adjacent territory," the court says:

"His own evidence shows that he violated

"this agreement. He killed and butchered "animals for sale in Almira, being for pur- "poses other than his own private use. He "had been engaged in the new market eith- "er as an employe or in some other capaci- "ty, and had also peddled meat in and near "Almira from a delivery wagon. The evi- "dent intention of the written contract was "that the appellant should in no way com- "pete with the respondent's business either "himself, personally, or in any other man- "ner, directly or indirectly. Such intent is "shown by the one specified exception re- "serving to appellant the right to kill ani- "mals for his own private use. There would "be no question of his having violated the "contract, even though he had been permit- "ted to show that the new market was own- "ed and operated by Flynn, and that he was "Flynn's employe."

In 20 Cyc. 1280, we find the following:

"It is not unusual for the seller of the good- "will of an established business to enter "into an agreement with the buyer to re- "frain from entering into competition with "him within specified territorial limits or "for a specified time. So long as the pur- "chaser continues in the business, and the "stipulation remains in force, the vendee "cannot lawfully enter into competition

"with him either on his own account or as "the agent and business manager of an- "other."

Also Vol. 24 American & English Ency. of Law, p. 859. (2nd Ed).

"Acting as Agent or Employe.—A covenant "not to carry on a certain trade is broken "where the covenantor does so as the agent, "or manager, or employe of another."

GEIGER V. CAWLEY, (Mich.) 109 N. W. 1064, wherein it is held that:

"An agreement of one not to carry on a "certain business in a certain place for a "certain time, on penalty of paying a cer- "tain sum, is breached by his carrying it "on as trustee of another." (Syllabus)

"Had defendant desired to reserve the right "to carry on business for others, he should "have inserted it in the contract." (p. 1065)

American Ice Co. v. Meckel, 95 N. Y. Supplement, p. 1060, being the case of an ice dealer who sold his business and good will with agreement not to engage in the business, directly or indirectly. We quote from the syllabus:

"The defendant remained in the business in "the employ of the successive owners, and "for several years had charge of the busi- "ness at West Washington Market as the "agent of the plaintiff. The plaintiff pre- "sents a prima facie case that the de-

> "fendant left its employ, and entered the "employ of one of its competitors, and has "endeavored with considerable success to "solicit the customers of the plaintiff, who "were formerly customers of Mulford & "Meckel to become customers of his new "employer. This is clearly a violation of "his covenant, to the right to enforce which "the plaintiff has succeeded."

The facts in this case are somewhat similar to the case at bar, and answers the argument of counsel for plaintiff in error in their Brief p. 22, where they say: "Rahmstorf himself caused the first breach thereof by employing Fleischman as a clerk in his own store." This is weak argument and foolishness, as courts look with favor upon contracts of the nature of the one in suit and give it that construction which seems most in consonance with the intent of the parties. An established business in a desirable locality has value independent of the actual value of the stock that may be on hand. Fleischman had been in business at Rampart for about twelve years when he sold to Rahmstorf. It is obvious that the purpose of this agreement was to transfer to Rahmstorf as far as could be done the personal favor of Fleischman in the community. This purpose was accomplished in the only way it could be accomplished, namely, by an agreement on the part of Fleischman that he would not engage in any way in the line of general merchandise

in Rampart for three years. It is likewise obvious that Rahmstorf would not have the benefit of this part of his bargain if Fleischman is permitted to engage in the same line of business within the prohibited time in the town of Rampart where he was well known and in which his personnel, influence and popularity would favor the competing business to the injury and damage of Rahmstorf, and there was and could be no breach or waiver of the agreement by reason of Rahmstorf employing Fleischman for a season. In the American Ice Co. v. Meckel case above cited the defendant remained in the employ of the company he sold to for several years before he engaged with a competing business, but the court did not take that fact into consideration in his favor in holding that he had violated his agreement.

In **Jefferson v. Narkert & Company, 112 Ga.** 498, 37 S. E. 758, the court in considering a parallel case where the defendant had obligated himself not to engage in the business of selling, handling or packing meats during a specified and reasonable time said that the defendant—

> "could not, without violating that contract,
> "carry on in that city, during the period
> "covered by the agreement a similar busi-
> "ness for another, or in another name, of
> "which he was the exclusive manager, and
> "the success of which depended upon his
> "skill, efficiency, influence, and popularity.

"* * * The contract is not confined to "preventing him from entering upon such "business in his own name, as owner and "proprietor thereof. It can be violated as "much by an employe and agent, especially "one who has the conduct and control of "the business, as it could were he the pro- "prietor of the business in which he en- "gaged."

See also **Nelson** v. Delaney (Ia.) 113 N. W. 843. (Deft. engaged in son-in-law's business).

Nelson v. Brassington (Wash.) 116 Pac. 629.

Smith v. Webb, (Ala.) 58 So. 913.

McAuliffe v. Vaughan, (Ga.) 70 S. E. 322.

See also **Johnson** v. **Blanchard, 116 Pac. 973, (Cal.)** in which the Court says:

"Another ground of objection to the com- "plaint is that it appears therefrom that "defendant was not engaged in business on "his own account, but merely as the em- "ploye of others. It appears that defendant "was conducting the business under the "name of Rynerson-Blanchard Company, "and that he, together with his wife and "her father, owned the business, and that "he was manager and executive head there- "of. The complaint thus clearly shows that "defendant had 'entered into a similar busi- "ness to that contracted to be sold.' Con- "ceding that he possessed no pecuniary in-

> "terest in the enterprise, nevertheless en-
> "gaging in soliciting business for the Ryner-
> "son-Blanchard Company, who was a com-
> "petitor of plaintiff, was a violation at
> "least of the spirit of his covenant."

and in **Kramer v. Old**, 119 N. C. 1, 25 S. E. 813, 34 L. R. A. 389, 56 Am. St. Rep. 650, the court says:

> "It is the duty of the court to restrain the
> "contracting parties from violating the
> "spirit, as well as the letter of the agree-
> "ment. Under a fair and just interpre-
> "tation of its terms, the stipulation meant
> "that the three defendants would not en-
> "gage in business, so as to bring their skill,
> "names, and influence to the aid of any
> "competitor carrying on the same trade
> "within the prohibited limits."

It is argued in the Brief of plaintiff in error (Brief p. 22) that no ulterior interest on the part of Fleischman in the Miners' Store can be presumed under the pleadings or the facts proved, and that Fleischman avoided EVEN THE APPEARANCE OF EVIL by withholding his own name or credit from the business, and also that he never endeavored to draw off any trade or customers of Rahmstorf. (Brief p. 21; Record p. 47). However, it is evident from the record that Fleischman expected trouble from Rahmstorf on account of his engaging in the merchandise business at Rampart within the prohibited period, and evidently his theory regarding

the matter was that as long as he did not carry on business in his own name he would not violate his agreement to refrain, hence he says: "I kept a very accurate system of books and papers for F. J. Kalning while I was clerking for him. I was careful that any little item billed to myself was corrected in each case, because I had heard that Mr. Rahmstorf threatened to bring suit against me. I was careful that no article should be charged to me, except perhaps talking machines." (Record p. 49) but the record nevertheless shows that people dealing with him thought he was the man running the business or they would not have consigned goods to his name, (See Exhibit C, Record pp. 17-21) nor was it necessary for Rahmstorf to allege and prove that Fleischman had drawn off any of his trade or customers.

Johnston v. Blanchard, 116 Pac. 973.

As to Amount of Damages Contemplated by Parties.

Counsel for plaintiff in error take up nearly four pages in their brief to discuss the question as to "What damages were contemplated by the parties in case of a breach?" (Brief pp. 23-26). The damages in a case of this sort must necessarily be uncertain and difficult, if not impossible of accurate determination, and therefore come within the rule permitting parties to agree upon what the damages shall be, and the same may be enforced as liquidated damages.

13 Cyc. 99.

Canady v. Knox, 86 Pac. 930, and cases cited therein. During the year Fleischman was violating his contract by accepting employment from a competitor, Rahmstorf testified that he did about $20,000 general merchandise business, (Record p. 41) and that as a consequence of Fleischman's breach "the sales decreased quite heavy, at least fifty per cent," (Record p. 34), so it would appear from the record that the sum fixed by the parties in the agreement can not be so grossly disproportionate to the actual damages as to be unconscionable; and as the trial judge said in his opinion, the result might not have been different even if evidence had been admitted to show actual damages. (Record p. 75).

Answer to Argument Upon the Law.

As to Assignments of Error I, II, III and VIII.

No reasons are given in any of the assignments why the rulings of the trial court were erroneous, and we submit also that no reasons are given in the brief showing error in these assignments. Counsel for plaintiff in error cite your honors to Vol. 13 Cyc. p. 101 on the proposition "that the general rule as to liquidated damages is not applicable to contracts for the payment of money alone; in such cases the courts construe the damages as penalty." This rule, however, does not apply to the case at bar. Just two pages ahead of this citation by counsel for plaintiff in error the court will find the fol-

lowing, which applies to the class of cases in question here under consideration, to-wit:

> "Where a contract has been made not to "engage in any particular profession or "business within stated limits, it has been "the policy of the courts to construe such "an agreement as liquidated damages rath-"er than a penalty, in the absence of any "evidence to show that the amount of dam-"ages claimed is unjust or oppressive, or "that the amount claimed is disproportion-"ate to the damages that would result from "the breach or breaches of the several "covenants of the agreement. While the "decisions in this class of cases are usually "based upon the fact that the damages are "uncertain and cannot be estimated, it has "also been held that where there is a prom-"ise to pay a particular sum in case of "breach, or where the payment of the sum "named is the very substance of the agree-"ment, a recovery may be had for the sum "named."

13 Cyc. 99.

Where is there any evidence in this case to show that the damages claimed are unjust or oppressive upon the part of plaintiff in error? Not a syllable, yet he asks this court to take it out of the general rule laid down by the courts in cases of this class, and hold that it is a penalty instead

of liquidated damages. The trial court's ruling in these particulars was correct and should not be disturbed.

As to Assignment of Error VI, VII, X, XI, XII, XIII and XIV.

Plaintiff in error having waived assignments IV, V and IX, it is unnecessary to notice them.

Most of the argument for plaintiff in error is built up from the erroneous premise that the agreement Exhibit A herein was entered into between the parties at some time after the sale of the business and good will had been completed, and upon a separate consideration. It is submitted, however, that the record plainly shows that this agreement Exhibit A was made at the time and as a part of the transaction for the sale of the business and good will, and this being the case much of the argument of plaintiff in error is not applicable to the facts as proved.

Counsel has quoted copiously from Sun Printing Co. vs. Moore 185 U. S. 642; 46 L. Ed. 366, and we may be pardoned for quoting a few words from the opinion in that case ourselves to show how the Supreme Court of the United States stands upon the doctrine of liquidated damages and penalties.

> "The decisions of this court on the doctrine
> "of liquidated damages and penalties lend
> "no support to the contention that parties
> "may not bona fide, in a case where the

"damages are of an uncertain nature, esti-
"mate and agree upon the measure of dam-
"ages which may be sustained from the
"breach of an agreement. On the con-
"trary, this court has consistently main-
"tained the principle that the intention of
"the parties is to be arrived at by a proper
"construction of the agreement made be-
"tween them, and that whether a particular
"stipulation to pay a sum of money is to
"be treated as a penalty, or as an agreed
"ascertainment of damages, is to be de-
"termined by the contract, fairly construed,
"it being the duty of the court always,
"where the damages are uncertain and
"have been liquidated by an agreement, to
"enforce the contract." (p. 662; L. Ed. 378).

Were Damages Stipulated in Agreement a Penalty Or Liquidated Damages?

Damages are deemed liquidated at the stipulated sum when the actual damages contemplated at the time the agreement was made are in their nature uncertain, and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and the amount fixed is not on the face of the contract out of all proportion to the probable loss.

Curtis v. Van Bergh, 161 N. Y. 47; 55 N. E. 398.

Ward v. Hudson River Bldg. Co. 125 N. Y. 230; 26 N. E. 256.

Defendant in error contends that the sum of $2,000 Fleischman promised to "forfeit" in his contract should he engage in the line of general merchandise within three years from May 26th, 1910, can only be construed by the court as "liquidated damages" and not as a penalty, and that when the defendant in error showed a breach of that covenant he was entitled to stand strictly upon the terms of the same, and the award by the trial court of the amount fixed by the parties themselves was just and proper.

The courts have long recognized the difficulty arising in fixing the actual damages in cases of this character.

In **1 Suth. Dam. p. 507**, the author says:

> "The damages for breach of contract for "the purchase of the good will of an estab- "lished trade or business are so absolutely "uncertain that courts have recognized the "fullest liberty of parties to fix before- "hand the amount of damages in that class "of cases. In the decision of such cases "the strongest expressions are to be found "to the effect that courts have no power "to defeat that intention on the pretext of "relieving from a bad bargain."

The Supreme Court of the State of Washington has passed directly upon this point in a case on all fours with the one at bar, the term of contract, the amount to be "forfeited" in case of breach

and language being similar, being the case of Canady v. Knox, 86 Pac. 930, the Syllabus being as follows:

> "Where the contract for the sale of a "butcher business obligated the sellers not "to again engage in business in competi- "tion with the buyer for a term of three "years, and provided that on breach of such "provision the sellers would forfeit to the "buyer $2,000, such amount was prima "facie an agreement for liquidated dam- "ages, and not a penalty."

This same case was again before the Supreme Court of Washington reported in 94 Pac. 652, when the question under consideration was again raised, and the court said:

> "Some contention is made by appellant to "the effect that the $2,000 named in the "contract was a penalty, and that no actual "damages has been shown. In our former "opinion (86 Pac. 930) we disposed of this "suggestion contrary to appellant's con- "tention, and that decision has become the "law of this case. The appellant at no "time asked to introduce evidence in addi- "tion to that above mentioned. His own "testimony sustained respondent's allega- "tion that he had violated the contract. "He and respondent had agreed on the "stipulated damages for such violation,

"and the court properly directed a judg-
"ment in respondent's favor."

(Canady v. Knox, 94 Pac. 652)

In **Potter** v. Ahrens, 43 Pac. 388. (Cal.), it was contended that the plaintiff was not entitled to the amount of damages found by the court. No evidence was put in by plaintiff to establish any actual damages suffered, but relying upon the stipulation on that subject contained in the contract of sale, plaintiff contented himself with showing a breach of the latter, and rested. The contract provided that for a violation of their covenant to refrain from engaging in a like business the defendant agreed to pay to the purchasers, or to their assigns, "the sum of $3,000 as liquidated damages." Defendant contended that this provision was in the nature of a penalty, notwithstanding the amount therein designated is termed "Liquidated Damages," and that plaintiff was required to prove the actual damage suffered by him, and be confined to the amount as shown. The court in its opinion said:

"This contention is clearly untenable. While
"the definition of parties in contracts of
"this character is not the invariable and
"controlling guide for construction, the
"subject-matter of the contract in this case
"was such as, in its very nature, in case
"of a breach, to render the proof of dam-
"ages extremely difficult, if not impossible,

"and to manifestly make a case for liqui-
"dated damages."

Defendant in error cites the following cases as also being in point on this question:

Hull et al. v. Angus, et al., 118 Pac. 284 (Or) (See 6th & 7th Syllabi and p. 288).

Shafer v. Sloan, 85 Pac. 162-3 & cases cited therein.

Geiger v. Cawley, 109 N. W. 1064.

Wills v. Forester, 124 S. W. 1090 (Mo) Syllabus as follows:

"Damages: Where a contract not to en-
"gage in a rival business in a particular lo-
"cality within a specified time provides for
"the payment of a stipulated sum on a
"breach, the amount is regarded as liqui-
"dated damages and not as a penalty."

As to Assignment XIV. Amendment at Trial.

There could be no error in the court allowing plaintiff below to amend his complaint by inserting in paragraph VI the words "As managing clerk of the Miners' Store," as the trial judge in granting the amendment aptly said:

"I do not see that it would particularly
"change the issues here. I don't see that
"the defendant's testimony would have
"been any different." (Record p. 55).

Counsel in their brief (p. 38) ask: "If the purpose of the contract was to exclude Fleischman from accepting employment as a clerk, why did

Rahmstorf employ him?" We answer this by asking another question: If Fleischman desired to reserve the right to carry on business for others as agent or manager, why didn't he insert it in his contract. See **Geiger v. Cawley, supra, p. 1065.**

As to Assignments XV, XVI, XVII and XVIII.

Plaintiff in error has something to say under this sub-heading in his brief (pp. 38-39) which squints at the proposition that the contract in question was unlawful, being in restraint of trade or business, and cites a number of cases, not one of which has reference to a contract to refrain from engaging in business after selling the good will thereof, and a remarkable thing about plaintiff in error's brief is that counsel seem to have studiously kept away from citing any single case therein in which the subject-matter of the action was a contract in any way similar to the one in this case. On this question of restraint, in addition to the cases already cited, many of which touch upon this subject, we cite especially **Thomas v. Gavin, (N. M.) 110 Pac. 841.**

In conclusion we submit that plaintiff in error has failed to point out to the court any error of the trial court which would warrant a reversal of the case or that the matter should be remanded for trial on the issue of damages. The weight of authority is unquestionably in favor of enforcing contracts such as the one under consideration, and de-

fendant in error prays that the judgment of the trial court be affirmed.

Respectfully submitted,

FERNAND DE JOURNEL and
G. B. ERWIN,
Attorneys for Defendant in Error.

Dated Fairbanks, Alaska.
April 22nd, 1915.

No. 2575

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

GEORGE M. HEALY, as Trustee in Bankruptcy of the Estate and effects of H. J. MARTIN,

Appellant,

vs.

W. H. WEHRUNG,

Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the District Court of the United States for the District of Oregon.

GLASS & PRUDHOMME CO., PORTLAND, OREGON

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

In the United States Court of Appeals for the Ninth Circuit.

GEORGE M. HEALY, as Trustee,

Appellant,

vs.

W. H. WEHRUNG,

Appellee.

Names and Addresses of the Attorneys of Record.

BEACH, SIMON & NELSON, Board of Trade, Portland, Oregon, for Appellant.

MANNING, SLATER and LEONARD, Fenton Building, Portland, Oregon, for Appellee.

In the District Court of the United States for the District of Oregon.

GEO. M. HEALY, as Trustee in Bankruptcy of the estate and effects of H. J. MARTIN,

Plaintiff,

v.

W. H. WEHRUNG,

Defendant.

CITATION ON APPEAL.

To W. H. Wehrung, defendant herein, and to Messrs. Manning, White & Hitch, his Counsel:

You are hereby cited and admonished to appear before the Circuit Court of Appeals of the 9th Judicial Circuit, at the City of San Francisco, in the State of California, on the 3rd day of January, 1915, pursuant to the order allowing the appeal filed and entered in the Clerk's Office of the District Court of the United States for the District of Oregon, from a final decree signed, filed and entered on the 11th day of June, 1914, in that certain suit, being in equity, No. 6147 wherein Geo. M. Healy is plaintiff, and you are defendant and appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said order allowing the appeal, is mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

WITNESS the Honorable R. S. Bean, United States District Judge for the District of Oregon, this 5th day of Dec., 1914.

R. S. BEAN,
U. S. District Judge for the District of Oregon.

State of Oregon,
County of Multnomah,—ss.

Due and timely service of the within Citation on appeal and the receipt of a duly certified copy all at the city of Portland, in said County and State, is hereby admitted.

JOHN MANNING,
Attorney for Defendant.

Filed December 5, 1914. G. H. Marsh, Clerk.

In the District Court of the United States for the District of Oregon.

July Term 1913.

Be it Remembered, That on the 24th day of October, 1913, there was duly filed in the District Court of the United States for the District of Oregon, a Bill of Complaint, in words and figures as follows, to wit:

Bill of Complaint.

In the District Court of the United States for the District of Oregon.

Complaint.

GEO. M. HEALY, as Trustee in Bankruptcy of the estate and effects of H. J. MARTIN,

Plaintiff,

v.

W. H. WEHRUNG,

Defendant.

The complaint of Geo. M. Healy, of the City of Portland, County of Multnomah, State of Oregon, as Trustee in bankruptcy of the estate and effects of H. J. Martin, Bankrupt, against W. H. Wehrung, the above named defendant, and thereupon the plaintiff complains and says:

I.

That on the 25th day of March, 1913, a petition was filed in the District Court of the United States

for the District of Oregon, by the said H. J. Martin praying that he, the said H. J. Martin, be declared and adjudicated a bankrupt in accordance with the Acts of Congress of the United States, approved July 1, 1898, as amended, known as "The Bankruptcy Act of 1898."

II.

That on the same date, by the order of said Court, said H. J. Martin was duly adjudged a bankrupt.

III.

That thereafter on the 15th day of April, 1913, at the first meeting of the creditors held in said proceedings, pursuant to due notice, the complainant, Geo. M. Healy, was duly elected Trustee of the estate and effects of said bankrupt, and immediately thereafter qualified by filing the required bond which bond was duly approved and ordered filed by this Court, and was filed, and that said complainant has ever since been and now is acting as said Trustee.

IV.

That on the 25th day of September, 1913, complainant petitioned for an order of this Court authorizing and directing him to bring action against the said W. H. Wehrung, defendant herein, for the recovery of the moneys hereinafter referred to, and thereafter on the 13th day of October, 1913, an order

was entered authorizing and directing your complainant to bring this action.

V.

That your complainant as said Trustee, is entitled to all the property of said bankrupt, and is entitled to all the property which was conveyed or assigned, or transferred by said bankrupt contrary to the provisions of the Acts of Congress of the United States, approved July 1, 1898, as amended, known as the Bankruptcy Act of 1898, as amended, and that he, the said complainant, more particularly is entitled to all property transferred, conveyed, assigned or paid by the said bankrupt within four months of the filing of the petition in bankruptcy by him to any creditor, the effect whereof would create a preference in favor of said creditor, as defined in the said Bankruptcy Act, said creditor having reasonable cause to believe that such transfer, payment or assignment would effect a preference as so defined.

VI.

That on the 4th day of March, 1913, and within four months of the filing of the petition in bankruptcy by the said H. J. Martin, said H. J. Martin paid, transferred and assigned to W. H. Wehrung, defendant herein, the sum of Fourteen Hundred and Seventy-three and 20-100 ($1473.20) Dollars, and that said sum was received by the said W. H. Wehrung, or on his behalf, and applied by him on alleged in-

debtedness of the said bankrupt to the defendant, and that on said date the said W. H. Wehrung, took notorious, exclusive and continuous possession of said sum of money, towit: Fourteen Hundred and seventy-three and 20-100 ($1473.20) Dollars belonging to H. J. Martin, and that at the time of taking and receiving said money said H. J. Martin was insolvent, and the said W. H. Wehruug had reasonable cause to believe that the said transfer, payment and assignment of said money would effect a preference in his favor, as defined in said Bankrupcy Laws, and that the said transfer, payment and assignment of money to the said defendant did effect such preference.

VII.

That the said Trustee is entitled to the said sum of Fourteen Hundred and seventy-three and 20-100 ($1473.20) Dollars paid to and taken by the Hillsboro National Bank, as aforesaid, with interest thereon at the rate of six per cent per annum from March 4, 1913.

WHEREFORE complainant prays for a judgment against W. H. Wehrung in the sum of Fourteen Hundred and seventy-three and 20-100 ($1473.20) Dollars, with interest on said sum at the rate of 6% per annum from March 4, 1913, and for the costs and disbursements herein.

BEACH, SIMON & NELSON
Attorney for Trustee of the Estate
and effects of H. J. Martin.

UNITED STATES OF AMERICA,
State and District of Oregon,
County of Multnomah,—ss.

I, Geo. M. Healy, being first duly sworn, depose and say: I am the plaintiff in the above entitled action, whose name is signed to the foregoing complaint and that all the facts therein contained are true, as I verily believe.

GEO. M. HEALY

Subscribed and sworn to before me this 24 day of October, 1913.

(Notarial Seal) N. D. SIMON
Notary Public for Oregon.

Filed Oct 24 1913. A. M. Cannon
Clerk U. S. District Court.

And afterwards, to wit, on the 17th day of November, 1913, there was duly filed in said Court and cause an Answer, in words and figures as follows, to wit:

Answer.

Comes now the above named defendant and for answer to plaintiff's complaint heretofore filed herein, admits, denies and alleges as follows:

I.

Admits paragraphs 1, 2, 3, and 4 of plaintiff's complaint.

II.

Denies each and every allegation, matter and thing set out and contained in paragraph 5 of plaintiff's complaint and the whole thereof.

III.

Admits that on the 4th day of March, 1913, and within four months of the filing of the petition in bankrupcy by the said H. J. Martin, said H. J. Martin paid, asssigned and transferred to W. H. Wehrung, the defendant herein, the sum of Fourteen Hundred and Seventy-three and 20-100 ($1473.20) Dollars, and that said sum was received by the said W. H. Wehrung and applied by him on an indebtedness of the said bankrupt, H. J. Martin, due the defendant W. H. Wehrung, and that the said W. H. Wehrung on said date took notorious, exclusive and continuous possession of said sum of money, to wit, Fourteen Hundred and seventy-three and 20-100 ($1473.20) Dollars, but said defendant denies each and every other allegation, matter and thing set out and contained in said paragraph 6 of plaintiff's complaint and the whole thereof.

IV.

Denies each and every allegation, matter and thing set out and contained in paragraph 7 of plaintiff's complaint and the whole thereof.

WHEREFORE, defendant demands that he go

hence without day and that he recover of the plaintiff his costs and disbursements herein.

MANNING, WHITE & HITCH
Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

I, W. H. Wehrung being first duly sworn, depose and say that I am the Defendant in the above entitled action; and that the foregoing answer is true, as I verily believe.

(Sgd) W. H. WEHRUNG.

Subscribed and sworn to before me this 4th day of Nov., 1913.

(Notarial Seal) (Sgd) ROBERT E. HITCH
Notary Public for the State of Oregon.

Filed November 17, 1913. A. M. Cannon, Clerk.

And afterwards, to wit, on Tuesday, the 11th day of June, 1914, the same being the 80th Judicial day of the Regular March, term of said Court; Present: the Honorable Robert S. Bean United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Final Decree.

Now, at this day, come the plaintiff by Mr. Roscoe P. Nelson, of counsel, and the defendant by Mr.

John Manning and Mr. Samuel White, of counsel; whereupon, this cause comes on to be tried by the Court upon the pleadings and the proofs; and the Court having heard the evidence adduced, the arguments of counsel and now being fully advised in the premises, it is Ordered, Adjudged and Decreed that the bill of complaint herein be, and the same is hereby dismissed, and that said defendant do have and recover of and from said plaintiff his costs and disbursements herein taxed at $

R. S. BEAN,
Judge.

And afterwards, to wit, on the 5th day of December, 1914, there was duly filed in said Court and cause, a Petition for Appeal, in words and figures as follows, to wit:

Petition for Appeal.

To the Honorable R. S. Bean, District Judge:

The above named plaintiff feeling aggrieved by the decree rendered and entered in the above entitled cause on the 11th day of June, 1914, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of error filed herewith, and he prays that his appeal be allowed, and that citation be issued as provided by law, and that a trans-

cript of the record proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals, for the Ninth Circuit under the rules of such court in such cases made and provided.

And your Petitioner further states that his appeal is in his capacity as Trustee in Bankruptcy, and prays therefore that no security be required of him on such appeal.

GEO. M. HEALY

Trustee in Bankruptcy of the estate and effects of H. J. Martin, Petitioner.

BEACH, SIMON & NELSON
Solicitors for Plaintiff.

Filed December 5, 1914. G. H. Marsh, Clerk.

And afterwards, to wit, on the 5th day of December, 1914, there was duly filed in said Court and cause, an Assignment of Errors, in words and figures as follows, to wit:

Assignment of Errors.

Now comes the Plaintiff in the above entitled cause and filed the following Assignment of Error upon which he will rely upon his prosecution in the appeal of the above entitled cause from the decree made by this Honorable Court on the 11th day of June, 1914.

First: That the United States District Court for the District of Oregon erred in failing to enter a decree herein in accordance with the prayer of the complaint and in dismissing the plaiintiff's Bill of Complaint, the basis of this contention being that the testimony required a decree in favor of the plaintiff in that the evidence adduced demonstrated that defendant within four months prior to the adjudication in bankruptcy of H. J. Martin, received a preferential payment from said Bankrupt, and that said defendant had, at said time, reasonable cause to believe that the Bankrupt was insolvent and that the defendant would thereby and did receive a greater percentage than other creditors of the same class.

WHEREFORE, the appellant prays that said decree be reversed, and that said District Court for the District of Oregon, be ordered to enter a decree in favor of the appellant, as prayed for in the Bill of Complaint herein.

GEO. M. HEALY

Trustee in Bankruptcy of the estate and effects of H. J. Martin.

BEACH, SIMON & NELSON

Solicitors for Plaintiff.

Due and timely service of the within assignment of errors and the receipt of a duly certified copy is hereby admitted.

Portland, Oregon, Dec. 5, 1914.

JOHN MANNING

Attys for Defendant.

Filed December 5, 1914. G. H. Marsh, Clerk.

And afterwards, to wit, on Saturday, the 5th day of December, 1914, the same being the 30th Judicial day of the Regular N*p*vember term of said Court; Present: the Honorable Robert S. Bean United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Order Allowing Appeal.

In the District Court of the United States for the District of Oregon.

GEO. M. HEALY, as Trustee in Bankruptcy of the estate and effects of H. J. Martin,

Plaintiff

v.

W. H. WEHRUNG,

Defendant

On motion of Roscoe C. Nelson, of counsel for complainant, it is hereby ordered that the appeal to the U. S. Circuit Court of Appeals for the Ninth Circuit, from the decree heretofore entered and filed herein be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said Circuit Court of Appeals for the Ninth Circuit, and that no security on appeal be required.

R. S. BEAN

Judge.

Dated: Dec. 5, 1914.

Filed December 5, 1914. G. H. Marsh, Clerk.

And afterwards, to wit, on the 5th day of December, 1914, there was duly filed in said Court and cause, a Praecipe for Transcript in words and figures as follows, to wit:

Praecipe for Transcript.

In the District Court of the United States for the District of Oregon.

Praecipe of Appellant for Transcript.

GEO. M. HEALY, as Trustee in Bankruptcy of the estate and effects of H. J. Martin,

Plaintiff

v.

W. H. WEHRUNG,

Defendant

To the Clerk of the above entitled Court:

Please issue certified Transcript of the Record in the above entitled suit to the U. S. Circuit Court of Appeals for the Ninth Circuit, said Transcript to consist of Bill of Complaint, Answer, Reply, Evidence hereto Attached, Appellant's Petition for Appeal, Order Allowing Appeal, Assignments of Error and Citation.

We request that the Transcript be prepared so as to comply with Rule 76 of Rules of Practise for the Courts of Equity of the United States.

Respectfully yours,

BEACH, SIMON & NELSON

Solicitors for Appellant.

Filed December 5, 1914. G. H. Marsh, Clerk.

And afterwards, to wit, on the 26th day of December, 1914, there was duly filed in said Court and cause, a Stipulation as to Transcript of evidence, in words and figures as follows, to wit:

Stipulation as to Transcript of Evidence.

In the District Court of the United States for the District of Oregon.

Stipulation.

GEORGE M. HEALY, as Trustee in Bankrupcy of the Estate and effects of H. J. Martin,
Plaintiff

v.

W. H. WEHRUNG,
Defendant

It is hereby stipulated and agreed by and between the above named parties, by their respective solicitors of record herein, that the Abstract of Record on appeal in this cause may include the Transcript of Testimony as taken and filed herein, in lieu of a statement of evidence in narrative form, and that said Transcript may be taken on appeal as and for the Statement of Evidence prescribed by the rules of the Circuit Court of Appeal for the Ninth Citcuit.

BEACH, SIMON & NELSON
Solicitors for Plaintiff

MANNING, SLATER & LEONARD
Solicitors for Defendant.

Filed December 26, 1914. G. H. Marsh, Clerk.

And afterwards, to wit, on Saturday, the 26th day of December, 1914, the same being the 48th Judicial day of the Regular November term of said Court; Present: the Honorable Robert S. Bean United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Order Settling Evidence.

Pursuant to stipulation between the parties, it is Ordered that the Transcript of Testimony taken and filed herein may be and the same is hereby made a part of the record on appeal, in lieu of a statement of the evidence in narrative form, and that said Transcript of Testimony may be considered as a Statement of the Evidence.

R. S. BEAN,
Judge.

Filed December 26, 1914, G. H. Marsh, Clerk.

And Afterwards, to wit, on the 28th day of December, 1914, there was duly filed in said Court and cause, the Evidence. in words and figures as follows, to wit:

Evidence.

Portland, Oregon, Thursday, June 11, 1914.

GEORGE M. HEALY,
Called on his own behalf as Trustee, being first duly sworn, testified as follows:

(Testimony of George M. Healy)

DIRECT EXAMINATION.

Questions by Mr. NELSON:

Mr. Healy, will you please state your occupation.

A. I am credit and office manager for Clarke-Woodward Drug Company.

Q. You held that same position in February and March, 1913?

A. I did.

Q. What connection, if any, have you with the bankruptcy of H. J. Martin? A. I am Trustee.

Q. And did you have any connection with Mr. Martin's business or affairs, or any relation to it before your appointment as Trustee?

A. Only in connection with his account at the time we were trying to collect it.

Q. What was the nature of his account to which you refer?

A. He owed us about seven thousand dollars.

Q. You refer to Woodard & Clarke, or the Clarke-Woodward Drug Company?

A. Clarke-Woodward Drug Company.

Q. How long had it been due?

A. It was—oh, it was overdue; it was probably a year-and-a half's purchases or more.

Q. Now, I will ask you what if any offer of settlement with creditors was made by Mr. Martin in February or March.

Mr. MANNING: We object to that, if the court

(Testimony of George M. Healy)

please, for the reason that the question simply asks what he had to do with Mr. Martin, which doesn't go to Wehrung, in any manner.

COURT: Not unless Mr. Wehrung had knowledge of it. You can put this testimony in.

Mr. NELSON: It is up to me to show insolvency at that time.

COURT: I understand that.

Q. You understand the question?

A. What is it please.

Q. (Read:) Now, I will ask you what if any offer of settlement with creditors was made by Mr. Martin, in February or March.

A. Yes, there was an offer made of 25%, the first one. My recollection is that they afterwards offered 20%.

Mr. MANNING: Will you please speak a little louder.

A. Twenty per-cent.

Q. I will ask you whether or not any meetings of creditors were held at this time with reference to this condition of Mr. Martin's business.

A. There was a meeting held in Mr. Sweek's office, a short time prior to the day he filed his petition in bankruptcy.

Q. How generally was that attended, do you recall?

A. There were a good many creditors there; about all that the rooms could hold conveniently. Probably fifty there.

(Testimony of George M. Healy)

Q. Now, will you please tell the court what was the nature of the assets of this bankrupt, of this estate of which you are the Trustee, at the time you took possession.

A. Well, do you refer to the appraisement?

Q. Yes, inventory also.

Mr. MANNING: You referred to assets.

Q. Inventory and appraisement.

COURT: The assets that came into your hands as Trustee.

A. The stock of the Rowe & Martin Drug Company and the stock of the Portland Post Card Company, post Cards. That was all.

Q. What was the inventory and appraised value of that stock?

Mr. MANNING: You have an inventory; you took one?

A. I have an inventory. We took an inventory, but I haven't it with me.

Mr. MANNING: Have you it with you?

A. No.

Mr. MANNING: I would like you to get it.

Mr. NELSON: I would say all of those papers are before this court, the files of this court. If counsel does not object, I would like for him to use any portion now, subject to putting in the papers themselves.

COURT: Have you the records here?

Mr. NELSON: All available in Mr. Murphy's office. I can get them.

(Testimony of George M. Healy)

COURT: Well, he can state.

Mr. NELSON: I will have them here for you.

A. The Rowe & Martin stock was appraised at $11,236.00.

Q. The Portland Postal Card stock?

A. The Portland Post Card, $7595.00.

Q. Have you the inventory values? Have you the inventory?

A. No, but I remember the Rowe & Martin Inventory to be $18,000.00, a little over, and the Post Card about $8,000.00.

Mr. MANNING: In addition to the $18,000.?

Mr. NELSON: Yes.

A. Not in addition, no.

Mr. MANNING: What?

A. Oh, the post card separately?

Mr. MANNING: $18,000 and $8,000?

A. Yes that would be right.

Q. How about the fixtures?

A. That included the entire appraisement.

Q. That included fixtures? A. Yes.

Q. Stock and fixtures are both included?

A. Yes.

Q. I will ask you what was the general nature and condition of these stocks.

A. Well, the post card stock was pretty poor stock; there was a great deal that had been there since the Seattle Fair, and it was old stock. It was hard to sell. The drug stock was pretty well run down. He hadn't kept that up for a year or more.

(Testimony of George M. Healy)

Q. Now what method of liquidation of these assets was followed?

A. I kept the Rowe & Martin store open for a month as a going concern, and the Post Card Company probably two months, and concluded that the Rowe & Martin store had been losing right along about $500.00 a month. The Post Card Company was just about breaking even.

Q. And what was done then with reference to selling?

A. We afterwards closed out the Rowe & Martin—packed up the Rowe & Martin stock and sent it to the warehouse. I couldn't find a buyer for it; and we sold the post card stock in bulk, the last sale, and got $2900.00 for it.

Q. Previous to that you had sold though portions of it in bulk, realizing practically cost, hadn't you?

A. Yes, we had sold some.

Q. And what did you realize from the drug stock?

A. Well, that was sold in detail. After I got it in the warehouse there were probably 150 sales from it there.

Q. Sold that in parcels? A. Yes.

Q. Got more for that than you could in bulk?

A. Yes, I couldn't get an offer for it in bulk at all.

Q. What amount in all was realized from the assets of Mr. Martin's estate?

A. There was $11,779, that is while I had it as

(Testimony of George M. Healy)

receiver and trustee, both. I was appointed receiver at the time he filed his petition in bankruptcy, temporarily.

Q. There were, I believe, a number of preferred claims which had to be paid in full? A. Yes.

Q. Do you know the amount of those?

A. No, I haven't——

Q. What was the net amount available for creditors, for distribution to creditors?

A. Well, there has been one dividend declared for five per cent, which took $2882.00.

Q. What amount was left for distribution?

A. I will correct that please; one dividend 5% is $2453; there is now in the bank $2882.

Q. Sufficient to pay another dividend?

A. Another of about 5%.

Q. 5%. Are there any other of the assets undisposed of?

A. None. A few bad accounts of no value.

Q. Do you know how much was realized from the accounts?

A. No, I haven't that separately.

Q. Are those accounts included in the figures which you gave as to the postal card and drug store assets? A. They are included.

Q. Oh, they are included? A. Yes.

Q. It includes then stock, fixtures and accounts?

A. Fixtures and accounts.

Q. Mr. Healy, what amount of claims against the estate were proven in bankruptcy?

(Testimony of George M. Healy)

A. $49534.00.

Q. Is that exclusive or inclusive of the preferred claims?

A. That includes.

Q. Preferred claims. Does that include the indebtedness to Mr. Wehrung, the Hillsboro Bank and Mrs. Wehrung? A. No.

Q. Do you know what indebtedness the schedules in bankruptcy show? A. Yes, I have that.

Q. You have the schedule with you?

A. I have the schedule here. $69,742.00.

Q. That is the voluntary petition in bankrupcy filed by Mr. Martin? A. Yes.

Q. And who was Mr. Martin's attorney in the matter?

A. Alex Sweek.

Q. Did he act for him throughout the proceedings? A. Yes.

Q. Now, Mr. Healy, you were credit man for Woodward & Clarke Company, or Clarke-Woodward & Company. A. Clarke-Woodward, yes.

Q. I will ask you whether or not you knew anything of this property in Washington County, in this litigation?

A. I knew he owned that.

Q. And what was the first intimation you had that it had been disposed of? When did you first know?

A. I didn't know it until after he filed his peti-

(Testimony of George M. Healy)

tion in bankruptcy. After Mr. Martin filed his petition in bankruptcy, that he had sold it.

Q. Is the first that you knew of it? A. Yes.

CROSS EXAMINATION.

Questions by Mr. MANNING:

How long have you been with Woodward & Clarke Company? A. About 15 years, the two firms.

Q. Are you a druggist? A. No.

Q. Who took the inventory for you as receiver in this bankruptcy?

A. Men in our employ.

Q. Men in your employ?

A. Yes. Well, I will qualify that; some of Mr. Martin's men. There were two of Mr. Martin's men.

Q. You don't know anything about the drug business yourself? That is you don't know the value of these drugs, do you?

A. No.

Q. Or the character?

A. Yes, I would know by looking at the stock, the packages and the brands, those that are out-dated, unsalable.

Q. But you are not a druggist?

A. I am not a registered druggist, no.

Q. Now, did you try to collect the amount of money due Woodward & Clarke Company from Mr. Martin when it was a going concern?

(Testimony of George M. Healy)

A. The money due from Woodward & Clarke?

Q. No, due Woodward & Clarke from Martin & Company? A. Yes.

Q. When it was a going concern? A. Yes.

Q. And did you collect any money from them at all?

A. No, not in the last year or so before he filed his petition.

Q. What?

A. During the year before he filed his petition, the last year that we did business with Martin was on a cash basis.

Q. But on the old account due your firm from Rowe & Martin, did he pay you any money during the last year that he was a going concern?

A. I can't recollect that he did.

Q. You would know if you saw your books, would you? A. Yes.

Q. You don't know whether he paid you anything within the four months prior to filing his petition in bankruptcy, did he?

A. Not on his old account; he owed us an old note, $5190; he never paid anything on that.

Q. He never paid anything on that; did he pay you anything on the account, on the open account?

A. No, only we would let him have goods today, and tomorrow he would send his check, although we kept that on the ledger account.

Q. I see, but as a matter of fact he did pay your

(Testimony of George M. Healy)

firm considerable money before he went into bankruptcy and within four months, did he not?

A. Yes, for goods sold on a cash basis.

Q. You say you would send goods over today and he would send you check tomorrow?

A. That was the arrangement.

Q. Thirty days would be cash also according to customary way of doing business? A. What say?

Q. Thirty days would be cash according to the customary way of doing business.

A. Not in this particular case, because we thought Mr. Martin was owing us too much then.

Q. Do you know Mr. Wehrung? A. No.

Q. You say there was a meeting of the creditors of Martin & Rowe, Rowe & Martin rather is the firm. Where did they hold their meeting?

A. In Mr. Sweek's office.

Q. How long before he went into bankruptcy?

A. I think that must have been a week; a few days before anyway.

Q. Did your firm threaten to put him into bankruptcy if he didn't pay what he owed you?

A. Not that I know of.

Q. You did the business for the firm, did you not?

A. Not that; Mr. Murphy, the attorney, had it for several months.

Q. Who?

A. Mr. Murphy. Chester Murphy was our attor-

(Testimony of George M. Healy)

ney in the matter several months prior to the time he filed his petition in bankruptcy.

Q. Now, you say you held a note against this concern for five thousand dollars? A. Yes.

Q. Signed by whom? A. Rowe & Martin.

Q. Who signed it?

A. Mr. Martin.

Q. Signed Rowe & Martin by Mr. Martin?

A. Yes, sir.

Q. Wasn't it Rowe & Martin by Rowe?

A. Oh, no. It wasn't Rowe. Rowe had no connection with it when we got that note.

Q. Oh, Rowe was out of the business?

A. Yes.

Q. Did you ever ask Mr. Martin for a statement of his assets prior to his bankruptcy?

A. No, but I think Mr. Murphy did, and Mr. Clarke did.

Q. Do you know whether he got it?

A. I think so.

Q. Do you know what it is?

A. Yes, I have a recollection of seeing the statement.

Q. Did it show the assets to be $49,554, as you have sworn to? A. The assets?

Q. Yes. A. No, I can't state that.

Q. Do you know how much it did? A. No.

Q. Would you kindly have that - - -

A. I think Mr. Murphy has that in his possession.

Q. Would you get it?

(Testimony of George M. Healy)

A. Yes, I will get it if he has it.

Q. Now, it was Mr. Murphy then that tried to collect this money from Martin when it was a going concern, and not you?

Q. Mr. Martin—yes, Mr. Murphy.

Q. What is the customary valuation of a stock like Rowe & Martin drug firm when they go into bankruptcy, taking an invertory? How do you take the inventory.

Q. Well, we took it at what it cost.

Q. Cost price? A. Yes.

Q. Taking it from Mr. Martin's bills?

A. Yes.

Q. And you are prepared to say that aggregated $49,550?

COURT: No, that is the claims.

Q. Oh, those were the claims; $18,000 for the drug account? A. That is it.

Q. And $8,000 for the postal cards.

A. I can only testify as to the drugs, the drug stock.

Q. What was that?

A. The cost value. It was about $18,000.

Q. You remember when you first considered that Martin & Rowe, or H. J. Martin was insolvent?

A. Well, Mr. Martin submitted several statements, and of course showed himself as solvent but it was my opinion, personal opinion, that he was not from the way he was running his business and the location that he had.

(Testimony of George M. Healy)

Q. Do you remember—can you remember any particular month, just prior to his going into bankruptcy, that he supplied you with a statement, showing that he was perfectly solvent?

A. No. It was within three months I guess; two or three months.

Q. It was within three months. Did you sell him any goods at all on time? Did you extend him any credit after you began trying to collect your claim of him?

A. No, only on cash basis. The arrangement we had with him was to pay as soon as he got his invoices.

Q. What?

A. The arrangement we had was that he should pay as soon as he got his invoices.

Q. Who did you sell these goods to?

A. How do you mean?

Q. The goods that you sold?

A. What do you mean, to Rowe & Martin or H. J. Martin?

Q. H. J. Martin?

A. Billed to Rowe & Martin

Q. I don't mean that. The goods now, the bankruptcy goods as trustee.

A. Oh, they were sold to the retail druggists here.

Q. Did you make the sales yourself?

A. No, I had a clerk.

Q. Who made those sales?

(Testimony of George M. Healy)

A. I had a man by the name of Pritchard, and another by the name of Prowell.

Q. Pritchard and who? A. Prowell.

Q. You don't know anything about the sale of the goods then at all, yourself, do you? The sale of the bankrupt stock?

A. Only that I checked them up every day.

Q. I know.

A. I didn't make any—I didn't sell the goods.

Q. To these men here in town?

A. I think so.

Q. You never had any conversation with Mr. Wehrung about his claim at all? A. No.

Q. Was his claim ever listed in any statement that you got from Mr. Martin?

A. I don't think so. I don't know. Mr. Martin always listed—he listed the property as an asset, though.

Q. He listed the land, you say? A. Yes.

Q. Have you got that statement he made? Murphy has it you say? A. Yes.

Q. Did he list his home up on 24th?

A. I think he included that, yes, sir.

Q. That is all you know about this case, is it?

A. Yes.

Witness excused.

Mr. NELSON: Now, if the court please, I ask that Mr. Healy go to Mr. Murphy's office and get those papers.

COURT: Very well.

(Testimony of F. A. Douty)

F. A. DOUTY

A witness called on behalf of the trustee being first duly sworn testified as follows:

DIRECT EXAMINATION.

Questions by Mr. NELSON:

Mr. Douty, what is your place of residence?

A. Portland?

Q. And your business?

A. I am in the lumber and logging business.

Q. And was your place of business and residence the same in February and March, 1903?

A. Yes. I have been here about twelve years in Portland.

Q. Mr. Douty, in February of 1913, were you well acquainted with property and property values in Washington County, Oregon.

A. No, I can't say that I was at that time.

Q. Had you invested or did you contemplate investing at that time in Washington County?

A. Well, I think along about the first of March, the first part of March, I did; probably it was the latter part—I think probably the latter part of February I started negotiations.

Q. Will you kindly explain in what manner you came to go into the investment in Washington County?

A. Along in the latter part of February, Mr. Wehrung told me that he had a good investment; knew where there was a good investment in Washington County up near Beaverton, and wanted to

(Testimony of F. A. Douty)

know if I knew of anybody that wanted to buy any acreage. I asked him some questions about it and he told me about the acreage that was there, and I asked him what the value of it was, and he said "Well, it could be bought for $150.00 an acre," but he thought it was a good buy at that price. Well, I told him I might take it myself if it was a good buy, and he suggested I go up and look at it, which I did a little later than that, went up and looked at it, and there were some people that had the adjoining property, that were living there; got their ideas of value of it, and came to the conclusion that it was a good buy at the price.

Q. Isn't it a fact that propety in the neighborhood was held at three or four hundred dollars an acre?

A. Well, the property adjoining on each side was improved; quite a lot of it is under cultivation and has good dwellings on it, good buildings, farm buildings. And one party told me that the property was worth from three to five hundred dollars an acre, he said, owing to the location around there; and the other party was about—said about $250.00 to $400.00; but this acreage that I bought, it is covered with brush. That is, it is in its raw state; it has never been cultivated. It isn't even fenced, and of course I figured it would cost probably $100.00 an acre to clear it up.

Q. Did you know Mr. Martin at this time?

A. No.

(Testimony of F. A. Douty)

Q. Did you know that Mr. Martin owned that property at this time?

A. I knew—yes, I knew he owned it. Mr. Wehrung told me it was Mr. Martin's land.

Q. Well, what if any statement did Mr. Wehrung make to you as the reason why you could buy the land cheap at that time?

A. Well, he said that there was a damage suit pending in the courts that they were expecting a decision on within a short time, and it was positive it was going against Mr. Martin, and it would be quite a sum, and it was necessary for him to raise funds to meet it.

Q. Did Mr. Wehrung tell you that Mr. Martin was in pretty bad shape?

A. No, I don't think he said anything further than that. That was all he said.

Mr. NELSON: If the court please, I ask the privilege of refreshing this witness' memory from testimony given by him at the bankruptcy hearing.

Q. Mr. Douty, if I understood you—I want to state this is testimony you gave before the Referee in Bankruptcy. Look at this answer to refresh your memory and then answer my question again.

A. Yes, that is just about what he told me, as I remember it, yes.

Q. Did he or did he not tell you that Mr. Martin was in bad shape?

A. I don't know that he referred to his business or went into detail about it. He said he was in bad

(Testimony of F. A. Douty)

shape; he had a judgment that would probably go against him and he had to pay it, or something to that effect.

Q. Now, I will ask you to also look at page 10 of your testimony. I will now ask you whether or not Mr. Wehrung told you at that time that Mr. Martin was badly in need of money.

A. Yes, that is the way I understood it. He would need this fund; need all the money he could get.

Q. Did Mr. Wehrung or Mr. Martin accompany you when you went to look at this property?

A. No, they did not, either one of them. I never saw Mr. Martin until, I think, the day before I bought the land.

Q. Who showed you the property?

A. Well, one of our employes, our city solicitors, went up with me; that is, I asked him to go along. Went up on the electric line to Beaverton, got off there, and made inquiry at Beaverton where it was located. I knew it was located about a mile-and-a-half east of Beaverton, but I got a description there of the direction, and we went out and looked at it. Wasn't any one went along.

Q. Did any one point out to you the boundary of the property?

A. No, the people living there told me the property in between the two fences was the Martin land.

(Testimony of F. A. Douty)

Q. You bought it on the strength of that examination and investigation?

A. Yes, I bought it on that and on the abstract, of course. On Mr. Wehrung's recommendation that it was all right.

Q. When you came back did you report to Mr. Wehrung you were ready to buy it?

A. No, I don't remember I said anything to him. He called me up in the course of three or four days after that and asked me if I had been out. I told him I had, and he wanted to know what I thought of it. I told him I thought from the infromation I could get it was a good investment and if the title was all right, I would take it.

Q. Did you make an appointment to meet him then for the purpose of closing it?

A. Well, I told him to have everything prepared for the closing of the deal and let me know when it was ready, which he did.

Q. Where did you meet?

A. Met down in the Lumbermens Building.

Q. In the Lumbermens National Bank Building?

A. Yes, in the Lumbermens National Bank Building.

Q. In what suite of offices did you meet?

A. I think in the main office there. I don't know whether Mr. Davis' office. I never was in there before. I don't know whose office it was.

Q. Do you know whether or not it was the suite

(Testimony of F. A. Douty)

of offices maintained by W. M. Davis and Mr. Alex. Sweek?

A. I didn't get the question.

Q. Do you know whether or not it was the suite of offices maintained by Mr. Davis and Mr. Sweek?

A. Yes, I think all offices of the same suite.

Q. With whom did you do your talking when you closed the transatcion. Mr. Martin, Mr. Wehrung, or who?

A. When I arrived at the office, Mr. Martin was there and Mr. Wehrung, and I think Mr. Davis, and Mr. Wehrung intruduced me to Mr. Martin. This was the first time I met Mr. Martin, and I told him that Wehrung had been talking to me about selling this land, that he wanted to sell this land, and said to him, probably, what Mr. Wehrung had told me. So I said whenever the deed was ready, I would take the property, and the understanding was I wasn't to pay any commision on it, no sale commision.

Q. Was the matter closed that day, or when?

A. No, it was closed the next day.

Q. Who were present the next day?

A. I don't remember now. I think Mr. Wehrung was there and I think Mr. Martin was there, and Mr. Davis, I think. All three of them.

Q. To whom did you give your check?

A. Well, when they gave me the deed, I laid the check on the desk; on a table it was if I remember. I don't know who took the check.

(Testimony of F. A. Douty)

Q. You don't know who took the check?

A. No, I took my deed and left.

Q. What was the amount of the check?

A. It was $5875.00.

Q. Have you that check?

A. Well, I have—whoever got the check took it down to the bank and got it certified, and the bank don't give up the original checks in a case of that kind. They simply give me—return a regular bank charging check. I have that. Of course the original check is at the bank.

Q. You don't know who cashed the check?

A. No, I don't know. I never have seen the check since I gave it. (Producing bank charge).

Q. Do you know the date? This bears no date. Do you know what date it was?

A. Well, it was either March 4th or 5th. I am not positive about that.

Q. The first week in March, anyway?

A. Yes.

Q. Fourth or fifth of March?

A. Yes, first of March.

Q. What lawyer represented you in the transaction or the purchase?

A. I didn't have any attorney.

Q. You had no attorney at all. Was the deed there all ready for you and signed that day?

A. Well, I think I went up there twice. The first time I went, they said it wasn't ready, but when I went back the second day—no the same day—the deed was ready.

(Testimony of F. A. Douty)

Q. Had Mrs. Martin signed it and acknowledge it?

A. Yes, when I went back the second time, the deed was all ready.

Q. Did you get an abstract of title?

A. Yes, I had an opinion; I got an opinion at that time for it and I got the abstract.

Q. When did you get the abstract?

A. I got an opinion probably four or five days before I closed the deal; I got the abstract, I think, the day before.

Q. You got the abstract the day before it was closed? A. Yes.

Q. And who gave you this opinion?

A. Mr. Wehrung gave me the opinion.

Q. Mr. Wehrung gave you the opinion?

A. Yes, that is he had some attorney in Hillsboro look it up.

Q. He had his attorney in Hillsboro look it up?

A. Yes.

Q. Did you pay for that or he?

A. No, I didn't pay for it.

Q. And you bought the property on that statement?

A. Well, I got the abstract; bought it on—I suppose the opinion was—certified that the abstract was correct, and I bought it on that recommendation.

Q. Now, Mr. Douty, aren't you mistaken about that? Isn't it a fact that you didn't have the abstract as late as May when you testified in the bank-

(Testimony of F. A. Douty)

ruptcy proceeding, you had never had an abstract? Isn't that correct?

A. No, I gave the abstract in the bankrupcy court at that time.

Q. At the time you testified?

A. That is a day or two afterwards they asked me to bring it in, and - - -

Q. Is it there still?

A. No, I have it with me.

Q. You have it with you?

A. Yes, I have a letter from you people when you sent it back to the office.

Q. Will you let me see that please?

A. The latter?

Q. Let me see the abstract. (Witness produces.) Is this the opinion to which you referred, this letter of Mr. Bagley's addressed to Mr. Wehrung?

A. Yes.

Q. This is also undated.

A. I hadn't noticed it wasn't dated. There is no date on it.

Q. Mr. Douty, this is a letter addressed to Mr. Wehrung by Mr. Bagley. You are aware of the fact that that constituted no security to you are you not, as a guaranty to you?

Mr. MANNING: If the court please, I think I ought to object to that.

Mr. NELSON: I am showing the way this transaction was carried on, a hurry-up sale, without an abstract, and that opinion, etc.

(Testimony of F. A. Douty)

COURT: It doesn't make any difference if Douty bought it without any examination at all.

Mr. MANNING: Hasn't alleged fraud.

COURT: Mr. Douty's knowledge of this is of no concern at the time he made the sale.

Q. Now, Mr. Douty, I will ask you to look at the certificate of title, which seems to be dated May 26, 1914.

A. Well, I sent that up there just recently and had it brought up to date. I paid the mortgage off the property. There was a mortgage on it. I took up the mortgage, and taken up this as soon as I took it up. I have been trying to sell the property and I wanted to keep it right up to date all the time.

Q. There was a mortgage of, I believe, a thousand dollars on the property, was there not?

A. Yes, there was.

Q. Mr. Douty, did Mr. Wehrung tell you at any time during the negotiations that the money was to go to him, the proceeds?

A. I don't recall that he did. I don't think he told me anything.

Q. Did you see any notes cancelled at the time the transfer was consumated? A. I didn't.

Q. You didn't see what became of your check at the time? A. I did not.

Mr. MANNING: Did you make a demand on us for these cancelled notes one time?

Mr. NELSON: Several times.

(Testimony of F. A. Douty)

Mr. MANNING: Here they are; do you want to see them?

Q. Mr. Douty, you paid $150.00 an acre for the property, as I understand?

A. Yes, sir.

Q. And there was 46½ acres?

A. 46.57 I think was the correct measurement.

Q. Did you figure that out, $5875.00?

A. No, that is what the abstract called for.

Q. Excuse me, did you figure that out as amounting to $5875?

A. Well, I deducted from the total amount the mortgage and the delinquent interest and the taxes.

Q. And $5875.00 was the balance?

A. Yes, after deducting the accrued interest and the taxes, it amounted to $5875.00.

Q. That is the way those figures were arrived at?

A. Yes.

Q. You had no attorney, as I understand, to examine the abstract of title? A. No, I did not.

CROSS EXAMINATION.

Questions by Mr. MANNING:

Mr Douty, to whom did you make that check payable, do you remember?

A. Made it payable to Mr. Martin. I think his initials are H. J.

Q. And I understand you to say that this—you were in possession of this instrument that you call an opinion prior to the date the deed was made?

(Testimony of F. A. Douty)

A. Yes, Mr. Wehrung gave me that opinion before I closed the deal.

Q. Did you read it? A. Yes.

Mr. MANNING: This is purporting to have examined the abstract, your Honor; it is made by Bagley at Hillsboro.

Q. That is all you know about this transaction, is it?

A. Yes, sir.

Q. Something was said to you about the value of the land. You said if I understood you that—he informed you that there were certain pieces of property which were well improved and which sold for an amount you specified, but that this land you bought was all unimproved, wasn't even fenced, is that right?

A. Yes, the property that adjoins this has orchards on, good buildings, well fenced and under cultivation.

Q. What do you consider this land worth per acre now?

A. Well, I put a price recently on it of $175.00; I did ask $200.00 for it. I haven't been able to dispose of it.

Witness excused.

W. H. WEHRUNG

a witness called on behalf of the Trustee, being first duly sworn testified as follows:

(Testimony of W. H. Wehrung)

DIRECT EXAMINATION.

Questions by Mr. NELSON:

You are the defendant in this case?

A. You will have to talk a little loud to me this morning. I have such a cold I can hardly hear.

Q. Mr. Wehrung, you have had business transactions with Mr. Martin, Rowe & Martin, covering a number of years, have you not? A. Yes, sir.

Q. Do you know when they began, the financial transactions began? A. With me?

Q. Yes. A. I think it was in 1908 if I remember rightly. May have been 1907 and may have been 1909. I am not so sure about the year.

Mr. MANNING: You may have those cancelled notes, Mr. Wehrung, if it will assist you in any way. (Handing notes.)

A. 1909.

Q. Mr. Wehrung, that indebtedness then continued through renewals, and extensions, etc., for a number of years, did it not?

A. Well, the first—I kept on making loans from time to time.

Q. And do you know when you last advanced actual money to them?

A. No, I can't recall just when I last advanced money to them.

Q. Could you tell by looking at the notes you hold?

A. Well, the money—I secured loans for them

(Testimony of W. H. Wehrung)

after this, after these notes, but I don't recall those dates.

Q. You secured for whom?

A. I secured from Kuratli Brothers at Hillsboro.

Q. Well, I am talking of your personal loans now.

A. Well, these speak for all the loans.

Q. But they don't say when the money was advanced. They may have been renewal notes, may they not?

A. No, these all were the—they have never been renewed except the note to the Hillsboro National Bank. That is the only renewal.

Q. Speaking of the note to yourself, did you give us the date on which you advanced the money which that represents?

A. Well, lets see. One was dated January 1, 1909—well, wait a moment; that was to my father, January 1, 1909. Well, here is one to me. I was looking to see if I see the assignment. On May 14, 1909. I thought here was another note but I don't see it. I think there is another note.

Q. You think there was another note. What was the amount of the other note, do you know?

A. Well, the two notes together amount to something like $1400.00 that was paid at that time.

Q. The notes payable to you personally?

A. The amount that was paid off here amounted to $1400.00.

Q. Payable to you personally?

(Testimony of W. H. Wehrung)

A. Payable to me personally, yes.

Q. The other notes you speak of running to the Hillsboro National Bank and Mrs. M. C. Wehrung?

A. Yes.

Q. You collected interest on them? A. Yes.

Q. And disbursed it among those entitled to it?

A. Yes.

Q. The dealings of the bank and your mother were all through you? A. All through me, yes, sir.

Q. Are you an officer of the bank? A. Yes, sir.

Q. President, are you not?

A. President of the bank.

Q. Now do you recall, Mr. Wehrung, in the year 1911, agreeing in conjunction with Mr. Sweek and the United States National Bank to postpone the payment of your claims against Martin and this postal card business until the other creditors had been paid?

A. Well, as I said before when I was examined on this matter, there was some kind of agreement, but I don't recall just what it was.

Q. Wasn't it of that general nature?

A. My understanding was that we were to let us drift along until he had taken care of some of these eastern claims. I don't think I ever saw any agreement; I don't think I ever did. I don't recall it now.

Q. You were more closely in touch with Mr. Rowe than with Mr. Martin, were you not?

(Testimony of W. H. Wehrung)

A. Up to the time Mr. Rowe left.

Q. And after that you saw Mr. Martin?

A. Yes, sir.

Q. You knew the disastrous results of their Seattle venture, did you not?

A. I can't say I did know.

Q. You didn't? A. No.

Q. You didn't know that was a disastrous failure?

A. No, I did not. I knew nothing of the inside of the business.

Q. I will ask you to look at your testimony before the Referee. You were asked this question: "You knew as a fact, didn't you, Mr. Wehrung, that it was a terrible failure" referring to the Seattle business, "and that they suffered great loss"?

A. I understand they suffered a loss over there, but I didn't know the extent of it. I don't know now.

Q. You don't? A. No.

Q. You mean the bank didn't know the extent of their loss?

A. No, sir, I didn't. Of course in a general way understood they lost some money, but I never was on the inside of it.

Q. Did they make any curtails of your indebtedness between May, 1909, or whenever the amount was loaned, and the date on which your note was paid?

A. Yes, they paid off one note of $1800.00; paid

(Testimony of W. H. Wehrung)

off a note of either eleven or twelve hundred dollars. I have just forgotten now.

Q. When was the last curtail made, or payment made?

A. Well, I can't—the last payment was made on these notes here.

Q. When?

A. I would have to look and see. Well, the interest was paid on the one note here, due May 23rd. The interest was kept paid up to July 30, 1912, and paid again March 4, 1913.

Q. That was the date on which you got payment of the principal?

A. Yes. Well, these were all paid the same date. All this interest was paid up on my notes and my mother's up to that time.

Q. July? A. July 30, 1912, and then———

Q. Well, I am speaking of curtailing the principal, though.

A. Well, the principal was all reduced on these notes; the payments made was applied on the other notes taken up, as I spoke of a few minutes ago.

Q. For the original amounts.

A. For the original amounts.

Q. They have never been curtailed?

A. Except the $1700.00 note was renewed for ninety days.

Q. How was the interest payable on these notes?

A. Well, it was payable annually.

Q. Is that the way the notes read on the face?

(Testimony of W. H. Wehrung)

A. I think so. Yes, that is the way.

Q. Does that note read that way?

A. At the rate of 8%. 8% per annum, doesn't it?

Q. Well, interest at the rate of 8% per annum; does that mean interest payable annually when you say 8% per annum?

A. Certainly. Of course that is a demand note; could collect the interest any time you pleased; could collect the note any time you pleased.

Q. Well, in your answer to that, you didn't mean to say that there was a provision that interest should be paid annually?

A. No, I mean to be understood like this: I understand any note draws interest so much per annum.

Q. How about this ninety-day note? How was interest paid on that?

A. It was payable at the end of the ninety days. It was due in ninety days.

Q. Was it paid at the end of ninety days?

A. It was always renewed at the end of ninety days.

Q. Was the interest always paid?

A. Always paid, yes, sir.

Q. Now, Mr. Wehrung, you received from Mr. Martin, or from Mr. Douty who just testified, $5875.00 on March 4th or 5th, 1913, did you not?

A. Yes, sir.

Q. And what application did you make of that?

A. I have a memorandum here. I don't have

(Testimony of W. H. Wehrung)

the notes in my possession. I paid the Hillsboro National Bank $1718.50; Mrs. M. C. Wehrung, $2683.30; myself $1473.20, making a total of $5875.00.

Q. That cleaned up all the notes held by yourself, Mrs. M. C. Wehrung and the bank?—

A. Yes, sir.

Q. That you were interested in? A. Yes, sir.

Q. What did you do with the notes?

A. I turned them over to Mr. Martin.

Q. What did Mr. Martin do with them?

A. Well, he called for Mr. Sweek, had him come out and handed the notes to him.

Q. Was Mr. Sweek interested in any of the notes so far as their face or back was concerned?

A. Mr. Sweek endorced on the $1700.00 note.

Q. Is that note there? A. Yes, sir.

Q. And these notes Mr. Martin handed to Mr. Sweek at that time? A. Yes, sir.

Q. You didn't file any claim in bankruptcy on behalf of yourself or Mrs.Wehrung or the bank, and none of these parties filed claims in bankruptcy?

A. No, I did not.

Q. The indebtedness was entirely cancelled?

A. Yes, sir.

Q. Now, did these amounts which you paid the bank and Mrs. M. C. Wehrung and yourself cover exactly what was due you at the time, no more and no less?

A. Well, a very few cents difference. I don't

(Testimony of W. H. Wehrung)

remember just what that was now but there was a very few cents difference.

Q. Was there a dollar's difference or a hundred dollars?

A. I don't think there was. I don't recall the amount; seems to me 35 cents, something like that. It was very close.

Q. About thirty-five cents?

A. I think so. I wont be sure about that; they will show, of course; the notes will show.

Q. Did you fix the price of the property to suit the amount of the indebtedness?

A. No, sir, I did not.

Q. You didn't fix the amount of the indebtedness to suit the price of the property? A. No, sir.

Q. It was just a coincidence that that $5875.00 which Douty paid exactly equalled the principal and accrued interest on these notes.

A. Yes, and if he had owed me a thousand dollars more, I would have taken his note for it.

Q. But he didn't? A. He didn't, no.

Q. You wouldn't have given him any difference?

A. What is that?

Q. You wouldn't have made him a present of any difference?

A. No, I am not going out and making presents.

Q. You are in the banking business and try to collect the money due you?

A. I try to; fail sometimes.

(Testimony of W. H. Wehrung)

Q. At that time that is what you intended to do, and did do?

A. Certainly.

Q. Will you give me the principal of those notes which you have, and which are the notes you cancelled? A. $1700.00.

Q. $1700.00? A. Yes.

Q. And payable to whom?

A. Payable to the Hillsboro National Bank. $1500.00; that is payable to M. C. Wehrung, and a thousand dollars is payable to M. C. Wehrung, and $1000.00 is payable to myself.

Q. Then you think another note is missing?

A. Yes, I know it is, because a credit of $250.00 on this note; a credit of $550.00.

Q. What did you say?

A. Just a moment here—more than that. Yes, there is another note missing, because here is a number of credits on this note of principal; on this note there was only $37.30 of principal back.

Q. How much?

A. $371.30, so there is another note that was paid at that time.

Q. You don't recall the amount of that note?

A. Well, it must have been a thousand dollars, because that and the accrued interest just about make the $1473.00.

Q. Do you remember whether or not the note was $1000.00.

A. Am pretty sure it was, but can't say it now.

(Testimony of W. H. Wehrung)

Q. Have you any memorandum of that?

A. No, I don't keep any memora*u*ndum of my own notes, never have.

Q. You can't recall at this time how much he owed you personally, or what notes you held?

A. That is what it was at that time.

Q. That was a thousand dollars?

A. That was the whole total of these notes paid me, two notes. The amount of the two notes I received the money for myself, however, was $1473.20. One of these notes was $371.30 principal; they cancelled that note, so the other note, you see, must have been around a thousand dollars.

Q. Yes, but I would like very much to know the amount of the note. A. I have no record of it.

Q. And you have no recollection.

A. No, I can't—I couldn't recollect those notes, until I had them before me.

Q. Had there been any curtail on the other note?

A. No, if on a thousand dollar note there couldn't have been very much; of course if it happened to have been a $1500.00 note, why there would have been.

Q. Have you ever seen that note since that day?

A. Have never seen any of the notes since then.

Q. Where did you get them?

A. You saw Mr. Sweek give to Mr. Manning now.

Q. Mr. Sweek gave them to Mr. Manning. The

(Testimony of W. H. Wehrung)

last you saw of the notes was when you gave them to Martin, and he handed them to Sweek?

A. Yes, sir; that is the last I have seen of those notes.

Mr. NELSON: If the court please, I would like to ask counsel at this time to produce that other note, if they can find it from the same source they got these.

COURT: If they can, but Mr. Wehrung says these notes have not been in his possession until his counsel produced them.

Mr. NELSON: I don't call him to account for it, but I would like to ask him to produce them if he has them.

Mr. MANNING: You can ask Mr. Sweek.

Mr. NELSON: If the court please, I would like to file these notes as separate exhibits.

Notes Marked Trustees Exhibits 1, 2, 3 and 4.

Witness excused.

Mr. NELSON: Have you any other note, Mr. Sweek?

Mr. Sweek: No, I have not. It may be in the files.

TRUSTEE EXHIBIT 1.

$1000.00 Portland, Oregon, May 14, 1909.

On demand, after date, without grace, we promise to pay to the order of W. H. Wehrung, Portland, Oregon, One thousand Dollars, in Gold Coin of the United States of America, of the present standard

(Testimony of W. H. Wehrung)

EXHIBIT 1—Continued.

value, with interest thereon in like Gold Coin at the rate of eight per cent. per annum from date until paid, for value received. Interest to be paid at maturity, and if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, we promise and agree to pay, in addition to the costs and disbursements provided by statute, such additional sum, in like Gold Coin, as the Court may adjudge reasonable for Attorney's fees to be allowed in said suit or action.

ROWE & MARTIN

No.———— By E. W. Rowe

Endorsements)

Nov. 15-09 Int. $40.00
March 1-1910 Int. 23.34
April 10-1910 Rec. 8.60

From note dated Mr. 15, 1908 over payments. Traltin(?) credits

June 1, 1910	$11.40			
Oct. 19-1910	Rec per Traltin?	$250.00		
" 19-1910	" " " int.	52.50		
Jan. 19-11	Rec per Traltin(?)	300.00		
May 15-11	Rec. interest to date			$13.29
June 15-11	" " " "			2.95
July 15-11	" " " "			2.95

(Testimony of W. H. Wehrung)

EXHIBIT 1—Continued.

Aug.	15-11	Rec. Interest to Date	2.95
Sept.	15-11	" " " "	2.95
Oct.	15-11	" " " "	2.95
Nov.	15-10	" " " "	2.95
"	15-10	on Principal W. H. W. bill	56.85

"	4-11	balance due on principal	$371.05
Dec.	15-11	Int.	2.60
Jan	15-12	"	2.60
Feby.	15-12	"	2.60
June	8-12	" to Mar. 15-12	2.60
July	30-12	" " April 15-12	2.60
Mar.	4-13	" " date	28.60*
"	" "	" " on principal	371.30
"	4-13	" " interest	28.60*

Int. is credited on this note twice.

TRUSTEE EXHIBIT 2.

$1000.00 Portland, Oregon, May 23, 1909

On demand, after date, without grace, we promised to pay to the order of W. H. Wehrung Portland, Oregon One Thousand Dollars, in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold Coin at the rate of eight per cent. per annum from date until paid, for value received. Interest to be paid at maturity and if not so paid, the whole sum of both principal and interest to become immediately due

(Testimony of W. H. Wehrung)

EXHIBIT 2—Continued.

and collectable at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, we promise and agree *ti* pay, in addition to the costs and disbursements provided by statute, such additional sum, in like Gold Coin, as the Court may adjudge reasonable, for Attorney's fees to be allowed in said suit or action.

ROWE & MARTIN (portion torn off here)

No.——— $73.30

(Endorsed across front in pencil) PAID.

(Endorsements on back of note)

Nov.	15-09	Int.	$41.75
March	1-1910	"	23.34
June	1-1910		20.00
W. H. Wehrung			
May	15-11	Rec. Int to date	$76.67
June	15-11	" " " "	6.67
July	15-11	" " " "	6.67
Aug.	15-11	" " " "	6.67
Sept.	15-11	" " " "	6.67
Oct.	15-11	Rec. int. to date	$6.67
Nov.	15-11	" " " "	6.67
Dec.	15-11	" " " "	6.67
Jan.	15-12	" " " "	6.67
Feby.	15-12	" " " "	6.67

(Testimony of W. H. Wehrung)

EXHIBIT 2—Continued.

June	8-12	Rec.	Int to Mar. 15-12	6.67
July	30-12	"	" " April 15-12	6.67
Mar.	4-13	"	"	73.30
Mar.	4-13	"	Prin.	1000.00

TRUSTEE EXHIBIT 3.

$1500.00 Portland, Oregon, Jan 1, 1909.

Six months after date, without grace, we promise to pay to the order of W. H. Wehrung, Portland, Oregon, Fifteen Hundred Dollars, in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold Coin at the rate of eight per cent. per annum from date until paid for value received. Interest to be paid at maturity, and if not so paid, the whole sum of both principal and interest to become immediately due and collectable, at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, we promise and agree to pay, in addition to the costs and disbursements provided by statute, such additional sum, in like Gold Coin, as the Court may adjudge reasonable, for Attorney's fees to be allowed in said suit or action.

No.—— ROWE & MARTIN,

by (portion torn off)

Endorsed on face:

$110. PAID.

(Testimony of W. H. Wehrung)

EXHIBIT 3—Continued.

Endorsed on back:

W. H. Wehrung

July	1st, 09 Paid int.	$60.00
Nov.	15-09 Int.	45.00
March	1, 1910 Int.	35.00
June	1-1910	20.00
"	1-1910	10.00
May	15-11 Rec. interest to date	$115.00
June	15-11 Rec. int. to date	$10.00

Pay to the order of M. C. Wehrung

July	15-11 Rec. int. to date	$10.00

H. Wehrung

Aug.	15-11 Rec. int. to date	10.00
Sept.	15-11 " " " "	10.00
Oct.	15-11 " " " "	10.00
Nov.	15-11 " " " "	10.00
Dec.	15-11 " " " "	10.00
Jan.	15-12 " " " "	10.00
Feby.	15-12 " " " "	10.00
June	8-12 " " to Mar. 15-12	10.00
July	30-12 " " " April 15-12	10.00
Mar	4-13 " "	110.00
"	" " "	1500.00

(Testimony of W. H. Wehrung)

TRUSTEE EXHIBIT 4.

$1700.00 Portland, Oregon, Jany. 15, 1913.

Ninety days after date, without grace, we promise to pay to the order of The Hillsboro National Bank, Hillsboro, Oregon, Seventeen Hundred Dollars, in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold Coin at the rate of 8 per cent. per annum from ———until paid, for value received. Interest to be paid at Hillsboro, Oreg., and if not so paid, the whole sum of both principal and interset to become immediately due and collectable, at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof,—— promise and agree to pay, in addition to the costs and disbursements provided by statute, such additional sum, in like Gold Coin, as the Court may adjudge reasonable, for Attorney's fees to be allowed in said suit or action.

ROWE – – – – –(Portion torn off.)

No. 1494. April 15-13.

Endorsed on face:

$18.50 PAID.

Mar.	4-13	Recd.	Int.	$18.50
Mar.	4-13	"	Prin.	1700.00

(Testimony of Alex Sweek)

ALEX SWEEK

A witness called on behalf of the Trustee, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. NELSON:

Mr. Sweek, you are an attorney?

A. I am, yes, sir.

Q. In this state. And you act as attorney for Mr. H. J. Martin, the bankrupt? A. Yes, sir.

Q. Before his bankruptcy and subsequently?

A. Yes, sir.

Q. It has been testified to by Mr. Wehrung that at the time of the payment of the sum of $5875.00, derived from the sale of real estate, certain notes which he held signed by Mr. Martin, and one of which I think he said was endorsed by you, were cancelled by him, handed to Mr. Martin, and by Mr. Martin to you. A. Yes, sir.

Q. In whose possession have those notes been since that time?

A. They have been in my possession.

Q. And where are they now?

A. Well, I thought they were all in this envelope when I brought them up this morning. There may be another one in the safe.

Q. When did you put them in that envelope?

A. Well, I put them in the envelope soon after they were given to me; not at the time, but soon afterwards.

(Testimony of H. J. Martin)

Q. Were all of them together when you put them in the envelope?

A. Well, I thought so. I wouldn't be sure. I may find another one there.

Q. Do you know what the amount of the missing note is, approximately?

A. No, I do not know.

Q. Have you any means of ascertaining that? Any data from which you could ascertain the amount of that note?

A. I would have no data of any kind whatever unless I should find the cancelled note in my office.

Witness excused.

H. J. MARTIN,

a witness called on behalf of the trustee, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. NELSON:

Mr. Martin, you are the H. J. Martin referred to as the bankrupt in this matter? A. Yes, sir.

Q. And do you recall the incident in connection with the cancellation of these notes?

A. Why, I don't know that I can. The business was done there in the office.

Q. By whom? A. Mr. Sweek.

Q. Mr. Sweek attended to it for you?

A. Yes, sir.

Q. And did you look at the notes at the time?

(Testimony of H. J. Martin)

A. Not then, no.

Q. Well, do you know how much you owed Mr. Wehrung, or what notes he held?

A. I think that the amount was on our books; Just the amount I couldn't tell you.

Q. Are you sure your books show this transaction, Mr. Martin?

A. Well, you mean this transaction, the last?

Q. The payment of these notes, yes.

A. I don't know that it did.

Q. You don't recall that?

A. No, I don't recall.

Q. Are you sure that your books will show the amount of the note?

A. Which note do you mean?

Q. The missing.

COURT: The notes to Wehrung.

Q. That you owed Wehrung.

A. I think on our journal book or ledger book, I think our bookkeeper kept a list of what we owed.

Q. Do you know what you owed him?

A. No, I do not. I don't remember the exact amount.

Q. Did you examine the notes at the time they were cancelled? A. Yes, I think so.

Q. But you don't recall the amounts of the notes?

A. No, I do not.

Q. You don't know whether Mr. Wehrung is right in his supposition that it was $1000.00 principal or not?

(Testimony of H. J. Martin)

A. I couldn't tell you, I am sure.

Q. Who handled that transaction for you?

A. Mr. Sweek.

Q. Was anything said at the time about the legality of the transaction, whether you had a right to do that?

A. Mr. Sweek said I had a right to ask—to sell the land to pay off what I wanted.

Q. Did Mr. Wehrung hear that advise?

A. I don't think Mr. Wehrung was there.

Q. You don't think he was there. A. No.

Q. What dealings did you have with the purchaser?

A. Why, I don't know as I had any more than to make out the deed.

Q. Did you make out the deed?

A. I think Mr. Sweek made it out for me.

Q. And Mr. Sweek or Mr. Wehrung attended to the sale entirely, did they not? A. Yes, sir.

Q. At the hearing before the Referee in Bankruptcy, you didn't even know the name of the purchaser of the property?

A. No, sir no. That is to my best recollection, I did not.

Q. Now, Mr. Martin, at that time there had been several suits against you, and attachments. Isn't that a fact?

A. I had this—if you mean this damage suit.

Q. No, I am not talking about the damage suit.

(Testimony of H. J. Martin)

A. Yes, I believe your firm brought a suit against me.

Q. Weren't there a good many other suits?

Mr. MANNING: What time do you mean, Mr. Nelson?

Mr. NELSON: At the time of this sale.

Mr. MANNING: The 4th of March.

Mr. NELSON: Along the first week in March.

A. I couldn't say whether the suit you brought was brought at the time the sale was made or before—must have been before or afterwards. I don't know which. I don't remember.

Q. You know that other suits were brought too, and attachments, were there not?

A. Yes, was one brought, a disputed account, a balance due for wiring the store which we shouldn't have paid at all; the building should have paid it but we paid it—just simply paid it rather than have the trouble and fuss, that is all.

Q. At that time you were behind in the payment of rent, were you not?

A. At the time the suit was brought?

Q. No, the 1st of March, 5th of March.

A. I don't remember.

Q. You owed a great many clerks, etc., back wages?

A. Well, I don't remember as to that, I am sure. Mr. Lomax paid the help; we might have owed them two or three days back. The payments might have been due on the 1st and paid on the 5th.

(Testimony of H. J. Martin)

Q. Your mercantile indebtedness and postal card indebtedness was practically all past due, was it not?

A. I think most of it was.

Q. Practically all past due?

A. Yes, I think it was.

Q. Notes to the United States National Bank and others were due? A. Yes.

Q. Past due?

A. Yes, I think the one to the U. S. National Bank was on demand.

Q. Demand note? A. Yes.

Q. And you had no cash on hand? A. No.

CROSS EXAMINATION.

Questions by Mr. MANNING:

You would know, however, would you not, Mr. Martin, if you had overpaid Mr. Wehrung at the time?

A. Why, I have every reason to believe that I would, yes.

Q. There was an attachment suit, so you testified, which was a disputed account, brought by Beach, Simon & Nelson? A. No, No.

Q. Well, there was a suit brought by Beach, Simon & Nelson, against you, was there?

A. Yes, sir.

Q. What became of it? A. I paid it.

Q. And this suit you testified to, that was a disputed account? A. Yes.

Q. What became of that?

(Testimony of George M. Healy)

A. Oh, I paid that too. That was for a small balance of $25.00, I think; something like that. I asked my attorney at the time if it wasn't the best thing to pay it, rather than have any notoriety, any fuss, or anything about it.

REDIRECT EXAMINATION.

Q. Mr. Martin, isn't it a fact that the suit you are talking about our firm having brought was brought some months before this time?

A. Well, I don't remember as to the time it was brought. I know it was brought through your office.

Witness excused.

GEORGE M. HEALY

Recalled by defense.

CROSS EXAMINATION.

Questions by Mr. MANNING:

I will ask you to take this instrument and state to the court what it is, and for what purpose you obtained it.

A. Well, this is a paper that was handed into the office of Mr. Clarke, I believe by Mr. Murphy, at the time he was trying to collect the claim. I don't know who made that out.

Q. What is it? What does it purport to be?

A. Supposed to be a list of Mr. Martin's assets and liabilities.

Q. What does it show?

(Testimony of George M. Healy)

A. He is claiming a net worth of $14,000; $14,805.00.

COURT: What is the date?

A. The first of February, 1913.

Q. Now, you see some pencil marks on that there; do you know who put them on?

A. I wrote those on.

Q. What did you write them on for? What is it?

A. Was analyzing the statement and wrote it there. He owes 80% of the assets; he is practically insolvent.

Q. He owed at that time, you say, nearly 80% of his assets? A. Yes.

Q. Still you swore here a little while ago—in other words you show there on that statement in your own handwriting, that he was owing nearly 80% of his assets, and you testify you sold for $18,000 the drugstore—the stock of drugs.

Mr. NELSON: Oh, no he didn't.

COURT: He swore to $11,000.

Mr. MANNING: Eleven thousand, and eight thousand, postal cards.

A. That was the appraisement.

Q. Oh, the appraisement was $11,000.00?

A. $11,000.00.

Q. That is the appraisement of the drugstore, and the appraisement of the postal card company was what? A. $7595.00.

Q. That is right, and you sold the stock of drugs?

A. Yes.

Q. And you testified you got $18,000 for it?

(Testimony of George M. Healy)

A. No, sir.

Q. $8,000 for the postal cards?

A. No, I didn't – – –

Q. Well, I am mixed up on that. Straighten it out.

COURT: He said he got $2900.00 for the postal cards. I didn't get the statement for the drugs but the entire amount received was $11,779.00.

A. That is correct. I don't know whose writing this is in this statement but it was in the office of the Clarke-Woodward Drug Company's files.

Witness excused.

TRUSTEE RESTS.

Mr. MANNING: If the court please, I desire at this time to ask for a non-suit. I don't see where Mr. Wehrung has been connected with knowledge.

COURT: This is an equity case. I don't know about a non-suit. Do you want to submit it on the record as it stands?

Mr. MANNING: I would like to have until two o'clock.

COURT: Very well.

Mr. MANNING: Just a moment. Maybe we can expedite the matter. If Mr. Nelson has no objection, I will put in this statement, which is the statement made by Mr. Martin to Mr. Wehrung.

(Testimony of W. H. Wehrung)

Mr. NELSON: Well, I will have to cross examine him on this statement. I couldn't very well let that go in without an examination of Mr. Wehrung as to what he thought of the figures.

Mr. MANNING: Well, we can put Mr. Wehrung back now, for that matter. This statement also, I would like to put in.

Mr. NELSON: I object to that statement going in. There has been no testimony as to who made those figures or anything else.

Mr. MANNING: Well, we wont put in evidence just now.

Statement marked "Defendant's Exhibit A for identification."

W. H. WEHRUNG

Recalled for defense.

DIRECT EXAMINATION.

Questions by Mr. MANNING:

Mr. Wehrung, you may take that instrument you have in your hand, and examine it and state what it is.

A. This is a financial statement made to me February 1st, of date February 1st, 1913, and was handed to me close to that date.

Q. By whom?

A. If I remember rightly by Mr. Martin, Mr. H. J. Martin.

(Testimony of W. H. Wehrung)

Q. What does it purport to show as to assets?

A. It shows the amount of the account of Rowe & Martin and the Portland Post Card Company, as well as the stock of goods as per inventory, and shows the indebtedness; also shows the net balance or surplus.

Q. Yes. A. The surplus shown here amounts to $6169.85.

Q. And was this land that was sold to Mr. Douty included in that? A. No, sir, not included in here.

Q. Was there any property owned by Mr. Martin included in that outside the drug stock?

A. Nothing but the drugstore and the Portland Post Card Company's inventory of goods and accounts; they are both here. No realty whatever.

Q. Was there any account in addition to what was shown there on that paper mentioned to you by Mr. Martin, and which he claimed had been fully satisfied?

A. Mr. Martin claimed to me that the claim at the United States National Bank had been taken care of.

Q. How much did that amount to?

A. I don't remember the amount. Either seven or nine thousand dollars runs in my mind.

Mr. MANNING: I desire to put this stsatement in evidence.

(Testimony of W. H. Wehrung)

Marked: Defense EXHIBIT B.

(P. C. Co
JOINT STATEMENT & R. & M.)
Feby. 1, 1913.

Acct Rec. R & M.	5444.76		9971.32	
P. C. Co	4526.56			
Mdse. (Inventory)	15785.19	R. & M.	40281.80	
	24496.61	P. C. Co.		
F. & F.	6064.50	R & M	7101.10	
	1036.60	P. C. Co		
Accts. Payable	7853.00	R. & M		17516.96
	5698.26	P C.Co (old)		
	3965.70	P. C. Co		
Bills Payable				
To Banks	6474.00)			33667.43
		) S & M		
Others	11052.89)			
Banks	8222.32			
		P. PC. Co.		
Others	7918.22			
Surplus				6169.83
			57354.22	57354.22

CROSS EXAMINATION.

Questions by Mr. NELSON:

Mr. Wehrung, did I understand you to say that the indebtedness of the United States National Bank was not included in here?

A. I understand it is included in there but is taken care of. That is my understanding.

(Testimony of W. H. Wehrung)

Q. And did you understand these bills payable included the indebtedness to yourself and every one else?

A. Yes, sir, I understood so.

Q. And that the accounts—all he owed on accounts was seventeen thousand dollars?

A. That is my understanding.

Q. Did you make any investigation after getting this statement?

Mr. MANNING: Objected to as immaterial and irrelevant. He could rely on this statement if he wanted to.

COURT: That is correct.

A. I made an investigation of course as far as could be made. I didn't go and take stocks.

Q. What investigation did you make?

A. That is where I got my information, by talking with Mr. Martin.

Q. That is what you meant by investigation, talking with Mr. Martin? A. Yes, sir.

Q. You were in his place of business frequently?

A. Quite often.

Q. In the postal card place?

A. Not so often. Very seldom.

Q. Did you have a general knowledge of his stock in these two places?

A. No, I can't say I have a general knowledge of that line of business.

Q. Did you know anything about the condition

(Testimony of W. H. Wehrung)

of this postal card business, with reference to any of that stock?

A. No, I didn't know anything about it.

Q. Did you understand this inventory price—the original cost price? A. That was my understanding, cost prices inventory price.

Q. Do you know anything about the enormous shrinkage of stock of that character?

A. No, sir, I do not.

Q. Did you ask whether allowance had been made for depreciation on any of this?

A. I did. My understanding was that some of the stock that was perishable would be nothing.

Q. What amount, do you know?

A. No, I couldn't recall that. I asked the question, for in my experience in business where we always take stock, there is a certain amount of stock valueless, at least we count as valueless and set aside. My understanding was that was the course they pursued.

Q. Was it also your understanding derived from your business experience that stocks of this character, several years old, as has been testified to, are figured at original cost?

A. Yes, sir. The goods are figured at actual cost. Of course if you have perishable stuff, of course, as I said before, that is set aside and of no value.

Q. Postal cards, for instance, five years old?

A. I just explained I knew nothing of the value postal cards.

(Testimony of W. H. Wehrung)

Q. You knew nothing of the value of this business?

A. My experience in business has been along the general merchandise line, and I suppose that there the same rule would apply.

Q. As I understand it then, as a banker in lending money you consider the inventory or original cost of the merchandise would be a fair valuation to put on it.

A. I don't see any other way to get at it. That is the way we figure all the time.

Q. You figure out value at the original cost?

A. At cost.

Q. In determining credit?

A. Most concerns figure cost with more added, and if they took their discount, then they took their discount off.

Q. Make no allowance for any depreciation?

A. As I said before all stock that is depreciated is set aside as of no value, and if the merchant gets anything out of it, he is just that much ahead. That is the way we figure.

Q. The furnisture and fixture account is a little over seven thousand dollars. Did you see the fixtures he had? A. I did.

Q. Did you judge them to be worth $7,000?

A. I judge so.

Q. Do you know they were bought on the installment plan?

A. I don't.

(Testimony of W. H. Wehrung)

Q. With reservation of title? A. I don't.

Q. Don't you know, as a business man, that fixtures like that wouldn't bring $300.00 if he owned them?

A. No, I don't know, that. We figure fixtures worth what they cost with a certain per cent of depreciation; that you are adding to every few months, two months, six months—to your fixtures; putting in something or adding to, so a merchant has a right to consider his fixtures at cost value always in making an estimate on his worth.

Q. I am talking about a banker who is lending money. Does a banker who is lending money figure them as an asset dollar for dollar at the original cost?

A. Certainly he takes that into consideration. He is not lending dollar for dollar. He is not going to work and lending any man who has $7000.00 in fixtures—he is not going to loan him $7000.00 on it.

Q. You are used to seeing statements and used to judging them? A. Yes, sir.

Q. You saw the account of fixtures; you noted the original cost, $7100.00? A. Yes.

Q. I will ask you whether or not it is a fact, as a banker you didn't know at that time and don't know now, as a matter of fact, even if he had title to those fixtures, assuming he had—as a matter of fact for liquidation purposes, for sale purposes, they wouldn't bring twenty cents on the dollar.

A. Liquidation purposes and doing business are two different things. If going to do business, it is

(Testimony of W. H. Wehrung)

necessary to have those fixtures; you can't replace those fixtures without money; you have got them in and probably advanced the price on account of taking off and adding every month or two to the fixtures, and have to figure the original amounts.

Q. I am not talking about record values, or anything of that kind, I am talking about from – – –

A. I am trying to answer the question and say the fixtures are worth dollar for dollar what they cost; can't do business without them.

Q. I want you to answer my question – – –

A. I am trying to answer.

Q. You are answering from the standpoint of Mr. Martin instead of Mr. Wehrung.

A. I don't think so.

Q. He made the actual statement to you.

A. All right.

Q. It may be from the testimony you have given that there is justice in your statement that a merchant in figuring his worth should put in the fixtures at what they originally cost him, but I am asking you as a banker, and the man who received the statement, you must look at it from the standpoint of what that stuff is worth, don't you?

A. Certainly I do.

Q. Not what it cost this man. You don't have an idea for a moment that $7100 worth of fixtures—originally cost him that—in a position like that would be worth $7100, do you?

A. I certainly did, to do business with.

(Testimony of W. H. Wehrung)

Q. You did?

A. Yes, sir, to do business with.

Q. Have you ever had experience in that line? Know something about it?

A. I have been in it about 25 years.

Q. Would any stock of fixtures bring anything like what they cost?

A. You don't seem—I don't seem to grasp you or you don't me. Here is the point exactly. If you are doing business, you have to do it with money and fixtures, don't you?

Q. Yes.

A. Now, any company liquidating that business, your fixtures are worth less than any part of your business of course, if you are going to liquidate, but a live business, your fixtures are worth par. That is the only way I know to explain the case.

Q. That is so from the standpoint of the man doing business.

A. Certainly.

Q. But now, loaning money to a man - - -

COURT: He didn't loan money on this statement. This statement is only important as to whether he had reason to believe this man was bankrupt at the time the statement was received.

COURT: Now, then you get that kind of a statement from a going concern, and nothing else, and no other knowledge of his business, then the question is whether a man wouldn't assume that Martin was bankrupt.

(Testimony of W. H. Wehrung)

Q. Yes, that is what I am asking. Here is a bank, and seeing that statement with fixtures $7100.00, whether he would say that was an asset of $7100.

COURT: Whether he would think the firm was bankrupt or not, insolvent. If a man knew nothing at all of another's business and got that kind of a statement, showing a balance of seven or eight thousand dollars, and it was a going concern and doing business, without any information or indication that it was insolvent or unable to pay its debts, he would naturally suppose it was a solvent concern, wouldn't he?

Mr. MANNING: That may be the fact, the bank will, but this man in the first place is not in the position of relying on a thing of this kind; this man was in business himself; saw these frequently; saw them frequently; was in touch with the business, as he says, and could make some estimate of it.

Q. Now, with reference to these accounts receivable, ninety-nine hundred and some dollars, did you know anything about any of these accounts?

A. Only in a general way.

Q. What did you know about them?

A. Well, all I knew was this, that we figure with a live business, the accounts are worth ninety-cents on the dollar, in a live business, and a man who looks after his business can collect—he can safely figure on collecting ninety cents on the dollar. Liquidation is a different proposition. You understand when a man liquidates his business, a great many men dispute their accounts, but as long as the business is

(Testimony of W. H. Wehrung)

alive that man will pay his account. Why? Because he wants more credit. That is my experience for 25 years.

Q. Did you inquire how old these accounts were, any of them?

A. No, I did not.

Q. Simply accepted these figures?

A. Certainly.

Q. And figured them worth 90 cents on the dollar?

A. Certainly that is what I figured.

Q. How about the merchandise inventory value, forty thousand dollars?

A. My understanding is it was taken at cost price.

Q. And what did you figure that worth?

A. Figured worth face.

Q. Face value?

A. Yes, sir.

Q. You made no allowance of 10% or any other percentage, did you?

A. No, sir, if this is figured at cost price and perishable stuff not taken, it is worth that.

Q. Why do you differentiate between stock and fixtures and accounts? Why do you make an allowance on accounts and no allowance on stock and fixtures. Don't they shrink as much?

Q. Is there any reason for it? I would like to know what you thought of it.

A. That is the way I figured all my life in business.

A. My experience is that in a live business you

(Testimony of W. H. Wehrung)

will not lose over 10% on the accounts if a man handles it right; while he is in business he can collect his accounts so he can retire and not lose many.

Q. Is it your experience also he would do the same with fixtures—get out on 100 cents?

A. I don't know that he can get out with a hundred cents unless he sells to some one who succeeds him in business. Then could probably get a hundred cents on the dollar and probably a premium.

Q. Now, to go back, I will ask why you made a depreciation on accounts and not on fixtures.

A. I can't explain it plainer.

Mr MANNING: It seems to me Mr. Wehrung misunderstands.

COURT: I understand he made a ten per cent allowance because his experience in business lead him to believe there would probably be a loss in collecting the accounts.

A. That is exactly it.

COURT: And he made none on the inventory price of goods because he supposed they would be sold over the counter.

Q. And how about fixtures—did you suppose they would be sold over the counter?

A. Now, if this business is going to be bought by somebody else and continued, those fixtures are worth what they cost, and probably more. A man would give cost readily before he would have those torn out and put in others.

Q. Did you ever hear of a concern in your busi-

(Testimony of W. H. Wehrung)

ness experience which sold its fixtures for more than it paid for them?

A. Well, I sold fixtures for more than they cost me, yes.

Q. Didn't you sell the good-will of your business?

A. No, I don't figure you can sell the good-will of your business.

Q. You sold fixtures and such for more than they cost?

A. I sold fixtures for a lump sum of money, more than they cost.

Q. What sale was that—Hillsboro?

A. Yes.

Q. What was the amount?

A. Well, I can't just recall the amount.

Q. Now, the accounts and bills payable figure up to $50,000. Did you investigate them at all?

A. Only as far as the statement goes and the talk I had with Mr. Martin.

Q. Did you know they were all past due, or practically all, as Mr. Martin testified?

A. No, I didn't understand it so.

Q. Did you know they were past due?

A. I understand the seven or nine thousand—whatever the amount was—to the United States National Bank was taken care of, and I understood that some of these claims, they had six, nine and twelve months; also understood he was paying cash for all goods he bought for the drugstore.

(Testimony of W. H. Wehrung)

Q. You knew he had asked and gotten an extension of a good many accounts, didn't you?

A. I said when I was on the stand before, I understood he had gotten an extension of some eastern accounts, the Portland Post Card Company.

Q. Do you know whether paid?

A. No, I couldn't say.

Q. You agreed to postpone the payment to yourself until paid, before getting your money. You didn't make any investigation of that question?

A. No, no; my understanding was I was to wait a year; that was my understanding.

Q. Your testimony as given before isn't accurate then? A. Yes.

Q. Your recollection now is different from what it was at that time?

A. My understanding was for twelve months. That is my understanding; extension made to the Portland Post Card Company for twelve months.

Q. Didn't you say before the general nature of your agreement was you were to postpone the collection of your account until the payment of these other accounts?

A. That is, they were to be paid in twelve months.

Q. Now, you say at the time – – –

A. Well, that is – – –

Q. (Interrupting) I just want to know what you say about it in your testimony. Did you inquire as to whether these accounts have been paid?

A. No, I haven't.

(Testimony of W. H. Wehrung)

Q. Never made any inquiry as to them?

A. I considered them solvent all the time.

Q. Now, here is a statement, Mr. Wehrung. You believed that the indebtedness was only $50,000.00 as I understand.

A. I believed just as it was on that statement.

Q. You know that their schedule filed showed $69,000?

A. I don't know that, only what I have heard here today.

Q. You had no previous information about that?

A. No, sir. None whatever.

Q. Did you know about owing back rent at that time? A. No, I didn't.

Q. Did you ask whether any preferred liability, such as wages, etc., to a number of employees?

A. No, sir, I did not.

Q. Did you know whether he had paid his taxes which were due and which were a preferred claim?

A. No, sir, I didn't ask that.

Q. Did you consider this a full and complete statement?

A. I certainly did. I called attention to the fact, of course, that his home wasn't in there, and the land wasn't in there, and he said, no, they weren't in there; they are all added to this; then he told me about the United States National Bank note being taken care of.

Q. Did he tell you that was not in there?

A. He said—it was my understanding it was. My understanding was everything was in.

(Testimony of W. H. Wehrung)

Q. What did you mean by being taken care of?

A. Well, I don't know.

Q. By an extension?

A. No, he said had been taken care of.

Q. You didn't consider this a full and complete statement?

A. All except his home and the real estate.

Q. You knew certain assets were omitted; didn't that make you believe some liabilities were also omitted?

A. No, I asked about it, and he said that covered all.

Q. You didn't check the statement at all further than this conversation with him?

A. That is all. I didn't go in and check his books over of course.

Q. Now, I will ask you this; Here is a statement showing Accounts Receivable $9900; Merchandise $40,000; Furniture & Fixtures $7000, aggregating $57,000. A. Yes, sir.

Q. And absolute obligations of $51,000. What did that statement indicate to you at that time?

A. It indicates there is a balance of something over $6000. Then he had land and a home amounting to about $15,000 or $16,000; amounting to about $21,000.

Q. $15,000 or $16,000; how did you get those figures?

A. Take $6,000 for the land at Beaverton, and probably $10,000 for his home. Worth that isn't it?

(Testimony of W. H. Wehrung)

Q. Is it? A. I should judge so.

Q. Sell at about $2600.00? A. Say $5,000.00.

Q. You knew that was exempt, didn't you?

A. I understand $1500 exempt.

Mr. MANNING: That is exempt, and it isn't. Might not be exempt, Mr. Nelson.

Mr. NELSON: Judge Bean has just held it is.

A. Understand I am not a lawyer, but I understand Judge McBride made a decision in the Circuit Court at Salem, and allowed a man to put up $1500.00 and take the property. I don't know whether anything wrong in that. He put up $1500.00 and took the property.

COURT: Could do that under some circumstances.

A. That is all the knowledge I have.

Q. Now, Mr. Wehrung, did that indicate to you this man was solvent or insolvent?

A. Yes, solvent.

Q. That indicated to you solvency?

A. Yes, sir. I believe now if it had been handled right, there would have been nothing to it.

Q. In spite of the fact that under the testimony it is shown that only ten per cent could be realized for the creditors?

A. Yes. I will bring an example, a business man in Hillsboro—if I am allowed to do this—a business man in Hillsboro with a stock that inventoried $1100.00 more than the indebetdness at cost price, clean stock. All of the dead stock was set aside, nothing. They sued this fellow and he got scared

(Testimony of W. H. Wehrung)

and went into voluntary bankruptcy. I went to Mr. Sabin and said "Let's have some one handle this; this man is not a bankrupt; we can help him out and save something. They jumped in and scared him to death and he went into voluntary bankruptcy. I had a claim of $800.00. The inventory showed, as I tell you, that the stock was, in round numbers, $1100 more than the indebtedness, not counting any dead stocks, and we got sixty-one cents on the dollar.

Q. That is more than ten cents, isn't it?

A. It shows a man can be solvent and still can't pay out.

Q. Did that experience occur before you got this statement? A. How is that?

Q. When was this experience?

A. About a year ago; a year-and-a-half ago.

Q. Well, you have had a similar experience before you got this statement.

A. I have always—when I mix up in business, I always put up more money – – –

Mr. MANNING (Interrupting) I don't see the intent of this examination.

COURT: The value of this property at the time of this transaction is to be construed as a going concern.

A. That is the point I was trying to get, Judge. They liquidated that business and got 61 cents. When alive the stock was worth $1100 more than the indebtedness; only an $8000 business.

Q. Did you, at that time, consider this concern a solvent one? A. I did.

(Testimony of W. H. Wehrung)

Mr. MANNING: That is the third or fourth time he has answered that question.

COURT: He has answered it.

A. And I would have loaned him more money if he had asked me for it.

Q. You would have loaned?

A. If he had come - - -

Q. As a banker on that statement?

A. Myself, I am talking about.

Q. You would have loaned him money on that statement? A. Yes, sir.

Q. Are you a personal friend of his?

A. Not particularly a personal friend at all.

Q. You would loan money on that?

A. Yes, sir.

Q. At 8%? A. Yes, sir.

Q. You can loan money on mortgages in Washington County at 8%? A. We can.

Q. You do? A. We don't loan on mortgages.

Q. You can? A. Yes, easy enough to lend.

Q. You would have loaned him money?

A. I have that much faith in him. Would have loaned him money.

Q. With that statement?

A. With that statement.

Q. Without security?

A. Without security.

Q. You didn't loan him any more at the time, did you?

A. He didn't ask me for it.

(Testimony of W. H. Wehrung)

Q. Did you on the contrary ask him to pay up?

A. I did, certainly. I made every effort I could to collect my accounts from him as I do everybody else.

Q. It seems to me if you had been willing to lend him more at that time, you would have been glad to have it out at 8% at that time. Why did you ask him for the money?

A. Because I wanted it.

Q. Why did you tell Mr. Douty he was in a bad fix, had to have money—had to raise money. Did you understand my question?

A. I understand your question. I understand it. Put the question again.

Q. (Read.)

A. I explained before, as you remember, I was trying to make this deal, and I didn't explain very much to Mr. Douty, except I explained he had a suit and there was a judgment against him, and he would probably have to have some money. I was leading up to the deal.

Q. You didn't mean have money to pay the judgment with, did you?

A. I meant just what I said. I wanted to bring the impression on Mr. Douty that this land was a bargain; was trying to make the sale.

Q. When you told him Martin was in a bad shape financially it wasn't because you believed so, but you wanted to make the sale; is that so?

A. You misunderstand that. There never was

(Testimony of W. H. Wehrung)

anything said about Mr. Martin's financial condition at all. I merely made mention of this damage suit that had been brought against Mr. Martin.

Q. You heard Mr. Douty's testimony, didn't you? A. Yes.

Q. And his saying he was in bad shape?

A. He must have meant that, because we talked of nothing else.

Q. What was the idea—you were going to beat this judgment? A. How is that?

Q. What was the idea of your statement? What was the basis of your statement—the gist of it?

A. I wanted to make that sale of land.

Q. To avoid paying the judgment that was to be gotten? A. No.

Q. What connection did the judgment have with the property?

A. I am trying to explain I was trying to make the impression, so I could make the sale.

COURT: Puff the land?

A. Yes, exactly.

Q. Why did you use judgment? Why did you mention the judgment? What did that have to do with the sale?

A. Well, that is all I had to mention, as far as that is concerned.

Q. You told him a judgment was to be obtained against Martin?

A. A damage suit.

Q. A judgment in a damage suit? A. Yes.

(Testimony of W. H. Wehrung)

Q. That is why he wanted to get rid of that property, and could be in bad shape?

A. I told—that was my reason why I thought the land could be bought at a bargain.

Q. What was your reason for thinking so? What was your reason for making this sale?

A. My actual reason for making the sale was to pay myself.

Q. That was your reason at the time?

A. Certainly.

Q. It didn't strike you as unusual that a merchant in a line of business of this kind should sell his piece of property and pay the money in that way and let you handle the transaction? A. Why, no.

Q. You employed an attorney—you paid Mr. Bagley? A. Yes.

Q. You never asked Mr. Martin to pay any of these expenses?

A. No.

Q. You and Mr. Sweek handled the entire transaction, as Mr. Martin says?

A. No, I had no business with Mr. Sweek at all, except I handed the notes to Mr. Martin and he called Mr. Sweek.

Q. Didn't you meet Mr. Sweek.

A. Met in the room when Mr. Douty, Mr. Martin and myself talked.

Q. You didn't think at the time that in doing that you would get more than any other creditor? Any other percent?

(Testimony of W. H. Wehrung)

A. I wasn't figuring any other creditor.

Q. You weren't knowing anything about other creditors?

A. No, sir.

Q. You didn't know anything about this offer of 20 cents on the dollar? Where?

Q. At the meeting of the creditors?

A. No, sir.

Q. Requesting an extension?

A. Never knew anything about it.

Q. You had no idea, when Mr. Martin sold, you were going to get more than any other creditor?

A. No, sir.

Q. You thought he was perfectly solvent?

A. Certainly did.

Q. You knew you had asked for your money and had been calling for it?

A. I never made a demand for the money.

Q. You hadn't? A. No, never did.

Q. I understood you to say a while ago you had asked for the money?

A. When I came in to make collection is when I asked for the money; when this land business came up—I explained before in my evidence; you probably remember it—that the bank examiner had turned the loan—it was the National Bank Examiner, you know—had wanted us to confine the loans in our own territory; he said "We want you to liquidate this note and some others as soon as you can con-

(Testimony of W. H. Wehrung)

veniently, and we would like to have you confine your loans in your own territory.

Q. That referred to the bank notes; not your own or your mother's notes?

A. They were requiring the assets in the vault to be perfectly safe.

Q. Why did you press collection and devise this method?

A. If I saw an opportunity, Mr. Nelson, to collect this money and sell this land, wouldn't I do it?

Q. That would depend on whether you considered it a good 8% loan as you indicated.

A. I would have a perfect right to try to collect those claims.

Q. You didn't consider that an unusual method, at all, of getting money? A. No, sir.

Q. Nothing to arouse your suspicion or anything of that kind?

A. I wouldn't have spoken to Mr. Martin if it hadn't been for the examiner; it would have run along indefinitely.

Q. You spoke of the examiner. That was in in February, I understand? A. February.

Q. This transaction took place the 4th or 5th of March? A. Yes.

Q. And at that time there was nothing to make you think it peculiar at all that this property should be turned over to you, practically, as it was?

A. Why no. I didn't see anything peculiar about it.

(Testimony of W. H. Wehrung)

Q. That didn't strike you as peculiar at all?

A. No, sir.

Q. You knew he didn't have money to pay you, didn't you?

A. No, I didn't know that.

Q. You knew his statement didn't show any cash, didn't you?

A. I didn't know what his resources were, of course; what his ability was to raise money. We hadn't gone into that.

Q. You knew he had no cash, didn't you?

A. No, I didn't know that. I can't say now whether I knew he had cash or didn't have cash.

Q. The statement doesn't show any cash does it?

A. I don't know as to that. I would have to look to see what it does show.

COURT: The statement shows for itself.

Witness excused.

Adjourned until 2. p. m.

Thursday, June 11, 1914, 2 p. m.

Mr. NELSON: If the court please, Mr. Sweek has found that other note which will be admitted.

Marked Trustee's exhibit 5.

Mr. MANNING: If the court please, I don't think we have any other testimony. I want to ask your Honor if you understood that at the time this

particular transfer was made this drugstore was a going proposition, the drugstore was open, and went into the hands of a receiver. The transaction was on the 4th of March.

COURT: I understand the petition in bankruptcy was filed along the latter part of March.

Mr. NELSON: The 25th of March.

Mr. MANNING: And the Postal Card Company was still a going proposition at that time.

That is our case, and I don't care to argue it.

TRUSTEE EXHIBIT 5.

Portland, Oregon, April 23rd, 1909.

$1000.00

Six months after date, without grace, we promise to pay to the order of W. H. Wehrung, Portland, Oregon, One thousand no-100 Dollars, in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold Coin, at the rate of eight per cent. per annum from date until paid, for value received. Interest to be paid at maturity, and if not so paid, the whole sum of both principal and interest to become immediately due and collectable, at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, we promise and agree to pay, in addition to the costs and disbursements provided by statute, such additional

sum, in like Gold Coin, as the Court may adjudge reasonable for Attorney's fees to be allowed in said suit or action.

No.———— ROWE & MARTIN (torn off)

Endorsed on face:

$73.30 PAID.

Endorsed on back.

		Nov. 15-09	Int.	$44.85-100
March	1-1910	"		23.34
June	1-1910	"		20.00
Aug.	10-1910	on note int.		33.93
May	15-11	Rec. Interest to date		$43.35
June	15-11	" " " "		6.67
July	15-11	" " " "		6.67
Aug.	15-11	" " " "		6.67
Sept.	15-11	" " " "		6.67
Oct.	15-11	Rec. Interest to date		$6.67
Nov.	15-11	" " " "		6.67
Dec.	15-11	" " " "		6.67
Jan.	15-12	" " " "		6.67
Feby.	15-12	" " " "		6.67
June	8-12	" " to Mar. 15-12		6.67
July	30-12	" " " April 15-12		6.67
Mar.	4-13	" "		73.30
"	4-13	" Prin.		1000.00

Filed December 28, 1914. G. H. Marsh, Clerk.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record on appeal in the case in which George M. Healy, Trustee in Bankruptcy, of the Estate and Effects of H. J. Martin is appellant and W. H. Wehrung is appellee, in accordance with the law and the rules of this Court, and in accordance with the praecipe of the appellant filed in said case and that the said record is a full, true and correct transcript of the record and proceedings had in said Court, in accordance with said praecipe, as the same appear of record and on file at my office and in my custody;

And I further certify that the cost of the foregoing record is $, for Clerk's fees for preparing the transcript of record and $ for printing said record, and that the same has been paid by said appellant.

In testimony whereof I hereunto set my hand and affix the seal of said Court, at Portland, in said District, on the 1915.

Clerk.

NO. 2575

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEO. M. HEALY, as Trustee in Bankruptcy of the Estate and Effects of H. J. Martin,
Plaintiff-Appellant.

v.

W. H. WEHRUNG,
Defendant-Appellee.

BRIEF OF APPELLANT.

Upon Appeal from the District Court of the United States for the District of Oregon.

BEACH, SIMON & NELSON,
Attorneys for Appellant.

J. F. SHELTON,
H. T. BAGLEY,
Attorneys for Appellee.

BOYER PRINTING COMPANY, PORTLAND, OREGON

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GEO. M. HEALY, as Trustee in Bankruptcy of the Estate and Effects of H. J. Martin,
Plaintiff-Appellant.

v.

W. H. WEHRUNG,
Defendant-Appellee.

BRIEF OF APPELLANT.

STATEMENT OF FACTS.

This controversy arose in connection with the estate of H. J. Martin, bankrupt, under administration in the District Court of the United States for the District of Oregon.

On the 4th day of March, 1913, Martin was heavily

involved and utterly insolvent. His assets consisted of a stock of goods in a drug store, a postal card shop, his home (claimed as exempt), 46½ acres of land in Washington County, Oregon, and some accounts of trifling value. The land was valued at approximately $7,000, and constituted the principal asset.

Martin owed at this time to mercantile creditors about $70,000, all of which was past due. He also owed W. H. Wehrung, the defendant herein, and the mother of the defendant, and the Hillsboro National Bank of which the defendant was President, approximately $5571.05. Martin was represented by Attorney Alex. Sweek, and at the time mentioned was offering through this attorney to his creditors, a settlement of 20 cents on the dollar.

The defendant Wehrung, in order to collect the claims represented by him, procured a purchaser of Martin's property in Washington County in the person of one Douty. Martin did not know Douty and had no conversation with him until the time came for signing the deed. In fact, at the first hearing in bankruptcy Martin did not even know who had purchased the land, the arrangements having all been made by Mr. Sweek, Martin's attorney, and Mr. Wehrung. Wehrung employed his own attorney to give Mr. Douty an opinion as to the title and Douty employed no one to examine the abstract, but depended upon the opinion of Wehrung's lawyer.

The transaction was consummated at the office of W. M. Davis, in the suite occupied by Davis and Alex. Sweek, Martin's attorney. The entire purchase price was turned over to Wehrung, who cancelled the Martin notes. The amount of the purchase price, by what Mr. Wehrung says was a coincidence, equaled exactly the

amount of the notes, interest, etc. Mr. Sweek, Martin's attorney, was the endorser on one of these notes.

Three weeks later Martin was adjudicated a bankrupt. The estate carefully administered paid the creditors ten cents on the dollar.

This suit was instituted by the Trustee under Section 60b of the Bankruptcy Act, providing:

> "If the bankrupt shall have given a preference and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

The U. S. District Court held that the evidence adduced by the Trustee was insufficient to bring the case within the provisions of that section, and the appeal is taken from the decree dismissing the suit, the only question therefore being the one stated in the single

ASSIGNMENT OF ERROR.

That the United States District Court for the District of Oregon erred in failing to enter a decree herein in accordance with the prayer of the complaint and in dismissing the plaintiff's Bill of Complaint, the basis of this contention being that the testimony required a decree in favor of the plaintiff in that the evidence ad-

duced demonstrated that defendant within four months prior to the adjudication in bankruptcy of H. J. Martin, received a preferential payment from said bankrupt, and that said defendant had, at said time, reasonable cause to believe that the bankrupt was insolvent and that the defendant would thereby and did receive a greater percentage than other creditors of the same class.

ARGUMENT.

In determining whether or not the transfer involved in this suit constitutes a preference within the purview of the Bankruptcy Act, the spirit and purpose of that Act must be the primary consideration. It was passed and is retained upon the statute books not merely to furnish a refuge for insolvent debtors, but as pointed out by the Supreme Court of the United States in the case of Toof v. Martin, 13 Wall. 40, 20 Law Ed. p. 78:

> "The act of Congress was designed to secure an equal distribution of the property of an insolvent debtor among his creditors, and any transfer made with a view to secure the property, or any part of it, to one, and thus prevent such equal distribution, is a transfer in fraud of the act."

The Supreme Court uses the expression "in fraud of the Act," advisedly. "Fraud" in a moral sense is not a necessary element in an inhibited preference. This is clearly pointed out by the Supreme Court of North Carolina, in the case of Wilson v. Taylor, 70 S. E. Rep. 286, 289:

> "It is not necessary in order to invalidate the preference, that there should have been any moral or actual fraud. It is simply a constructive fraud, arising by law upon the existence of certain facts and forbidden by it. There is nothing dishonest or illegal in a creditor, obtaining payment of a debt due him by a failing or embarrassed debtor, nor in his attempting by proper and ordinary effort, to secure an honest debt, but such an act may otherwise become constructively fraudulent and illegal by reason of the filing of a petition and an adjudication in bankruptcy. It is voidable by the trustee of the bankrupt's estate because the law says it shall be so, regardless of the moral quality of the act, or intent or motive of the debtor, however honest it may have been. The law considers only the ultimate effect of such act as being inconsistent with the very purpose and policy of the bankrupt act, which is the equal and equitable distribution of the bankrupt's estate among his creditors, subject only to the preferences or priorities therein allowed."

In the study of the case at bar we have read many decisions in controversies over real or alleged preferences, but if there is any instance in the books more flagrantly violative of the spirit of the Bankruptcy Act than that here discussed it has escaped our attention. We ask the Court to consider these bald facts which constitute the skeleton of the case and *as to which there is no dispute*:

A debtor is grossly insolvent, offering a settlement of twenty cents on the dollar to his creditors. The debtor's lawyer is responsible on some of his paper held by a creditor representing $5,875. On the advice of that lawyer, the debtor, on the eve of bankruptcy, transfers his princi-

pal asset, his unexempt real estate, to a hurry-up purchaser, produced by that creditor, the creditor furnishing and paying his own lawyer for services in connection with the title in order to save the time of examining the abstract.

The transaction is consummated in the suite occupied by the debtor's lawyer. The selling price by a remarkable coincidence exactly equals the indebtedness to the creditor—$5,875. The debtor a few weeks later does not even know who purchased the property. The creditor thus secures one hundred cents on the dollar, and all the other creditors ten cents.

If the bankruptcy law is anything other than a farce and a pretense insofar as the preservation of parity between creditors is concerned, these facts constitute, without the production of any additional circumstances, intrinsic evidence that a preference has occurred which should be nullified. Before taking up the testimony in greater detail, we ask consideration of the construction placed by the Courts on the section of the Bankruptcy Act in question, and the nature of the proof required thereunder.

It may be remarked that four elements are necessary to constitute a voidable preference:

First, the debtor must have been insolvent at the time of the transaction;

Second, the transaction must have taken place within four months before bankruptcy proceedings.

Third, the effect of the transfer must have been to give the preference creditor a greater percentage on his claim than that accruing to other creditors;

Fourth, there must have existed at the time of the

transfer reasonable cause for the creditor to believe that it would result in a preference.

The presence of the first, second and third elements are not disputed. The Bankruptcy Schedules showed an indebtedness of about $70,000, excluding the $5,875, represented by Wehrung. The assets under careful administration yielded a gross sum of less than $12,000. Much of this was consumed in paying priority claims and the general creditors received ten cents on the dollar.

We are concerned therefore only with the fourth element. With regard to the proper interpretation of this particular and important phase we ask the attention of the Court to

SOME ILLUSTRATIVE CASES.

The leading and most oft-cited cases in this connection are two, which construe similar sections of the former Bankruptcy Act. The first is Toof v. Martin, 13 Wall. 40, 20 L. Ed. p. 78, wherein Mr. Justice Field said:

* * * * *

> "The statute, to defeat the conveyances, does not require that the creditors should have had absolute knowledge on the point, nor even that they should in fact, have had any belief on the subject. It only requires that they should have had reasonable cause to believe that such was the fact. And reasonable cause they must be considered to have had when such a state of facts was brought to their notice in respect to the affairs and pecuniary condition of the bankrupts as would have led prudent business men to the conclusion that they could

not meet their obligations as they matured in the ordinary course of business."

The other is Wager v. Hall, 16 Wall. 584, 21 L. Ed. 506, wherein the Supreme Court of the United States fully and clearly laid down the connotations of the language used in the Bankruptcy Act:

> "Nothing remains therefore to be re-examined, except the issue whether the respondents had reasonable cause to believe that the mortgagor was insolvent and that the conveyance was made in fraud of the provisions of the bankrupt act. Proof that the respondents had actual knowledge that the mortgagor was insolvent at that time is not required to support the prayer for relief, but the allegation in that behalf is sustained if it appears that they had reasonable cause for such belief, as that is the language of the bankrupt act. *Actual knowledge of the alleged fact is not made the criterion of proof in such an issue, nor is it necessary that it should appear that the respondents actually believe that the mortgagor was insolvent; but the true inquiry is, whether they, as business men, acting with ordinary prudence, sagacity and discretion, had reasonable cause to believe that the debtor was insolvent, in view of all the facts and circumstances known to them at the time the conveyance was made.* Coburn v. Proctor, 15 Gray. 38. Unless the debtor was in fact insolvent it cannot be held that such a grantee had reasonable cause to believe the allegation; but if it appears that the debtor was in fact insolvent as alleged, and that the means of knowledge were at hand, and that such facts and circumstances were known to the grantee as were clearly sufficient to put a

person of ordinary prudence and discretion upon inquiry, it is well settled that it would be his duty to make all such reasonable inquiries to ascertain the true state of the case. * * * * * Creditors have reasonable cause to believe that a debtor, who is a trader, is insolvent when such a state of facts is brought to their notice respecting the affairs and pecuniary condition of the debtor as would lead a prudent business man to the conclusion that he is unable to meet his obligations as they mature in the ordinary course of business. Toof v. Martin, 13 Wall, 40, 20 L. ed. 481. *All experience shows that proof of fraudulent acts, between debtor and creditor, is not generally to be expected, and it is for that reason, among others, that the law allows in such controversies, a resort to circumstances as the means of ascertaining the truth, and the rule of evidence is well settled that circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidence, be sufficient to constitute conclusive proof, which is a rule clearly applicable to the facts and circumstances disclosed in this record."* (Italics ours.)

All of the later cases are but variations, modifications, and amplifications of this doctrine. We mention only a few.

One of the cases most frequently cited is the well considered decision in Coder v. McPherson, 152 Fed. 951; participated in by Circuit Judges Sanborn, Hook and Adams, in which a decision of the District Court that a mortgage to a bank executed shortly before bankruptcy of the mortgagor, did not constitute a preference,

was reversed. The Court referred to the known difficulty of converting real estate into money to pay debts, as an obvious "danger signal," and added with reference thereto:

> * * * "which could not have failed to incite a creditor of ordinary prudence to searchingly investigate the solvency of the debtor.
>
> *Notice of facts which would incite a man of ordinary prudence to inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose.*
>
> The inevitable effect of these incumbrances was to deprive the unsecured creditors of every means of collecting their debts; for these mortgages withdrew from attachment and execution substantially all the debtor's unexempt property. The legal presumption is that parties intend the inevitable effect of their acts, and, in view of all these facts, the conclusion is irresistibly borne in upon our minds that the court below committed a serious mistake of fact in the examination of the case, and that the bank on July 13, 1904, when it took these mortgages, had reasonable cause to believe that it was intended thereby to give it a preference over other creditors of the same class." (Italics ours.)

For a discussion of the subject which is thorough and we believe unexcelled in clarity and force of logic we ask the Court to read the opinion in Ogden v. Reddish, 200 Fed. 977. To quote apposite portions would require our copying here practically the entire opinion.

We also invite the court's attention to the following as particularly well considered and apt decisions:

In re Hines, 144 Fed. 545;
In re C. J. McDonald & Sons, 178 Fed. 487;
Stern v. Paper, 183 Fed. 228;
Alderdice v. Bank. Fed. case No. 154;
In re Va. Hardwood & Mfg. Co., 139 Fed. 312;
McGurr v. Grocery Co., 192 Fed. 55;
Bardes v. Bank (Iowa) 98 N. E. 284;
Whitwell v. Wright, 115 N. Y. Supp. 48;
Heyman v. Bank, 216 Fed. 685;

EAR MARKS OF PREFERENCE IN THE INSTANT CASE.

It results from these cases that a business man, ordinarily alert, keen and vigilant cannot appropriate the bulk of an insolvent estate on the plea that he should be absolved from accounting to the other creditors, because he deliberately shut his eyes, or refrained from exercising his faculties; he cannot be heard to say that a transaction of most unusual character the effect of which was to enable him to collect 100 cents on the dollar, while other creditors got ten cents, hurried through obviously for that purpose, did not appeal to him as out of the ordinary. The Supreme Court of the United States pointed out in the case of Wager v. Hall, supra, that it will not often be possible to procure admissions of knowledge that a preference is being secured or even direct evidence thereof, and that resort must be had ordinarily to the *circumstances* of the particular case. In the light of that familiar fact we call the court's attention to some of the eloquent circumstances of this trans-

action, which render it palpably a gross violation of the equitable principles of the Bankruptcy Act.

(a) LONG PERIOD OF INDEBTEDNESS.

The indebtedness from Martin to Wehrung and those represented by Wehrung, was of long standing. It dates back certainly as early as January or May, 1909, and some years prior to that, although Wehrung's testimony in this particular was not clear. Wehrung admitted that he had made frequent unsuccessful efforts to collect (Transcript, p. 88), and this fact in itself makes it clear that Wehrung knew Martin was unable in the ordinary course of his business to liquidate the indebtedness. The National Bank examiner had complained as to the note due the Hillsboro National Bank. The Court surely has the right to exercise the acumen which it is fair to attribute to men of affairs, and we urge the fact that neither the Bank at Hillsboro, nor a banker in that place is anxious to retain an unsecured loan to a person at Portland, who is not one of its depositors and who is not even a personal friend of the banker (Transcript, p. 87). It taxes credulity that a shrewd bank president like Wehrung felt at ease with regard to a long standing indebtedness of this character.

It is true Defendant Wehrung testified that although he could place his money on mortgages at the same rate of interest he was glad to have this unsecured loan. In fact it was such a splendid investment, according to Wehrung, that although he was not a friend of Martin, he would gladly have loaned Martin more money at the time when he made this surprising collection. (Tran-

script of Record, p. 87.) The 'note of exaggeration' in similar "sweeping statements" was referred to as affecting the value of the creditors' testimony in Ogden v. Reddish, 200 Fed. 977.

This curious testimony of Wehrung's is to be taken in connection with the fact that some time before, Wehrung had had to agree to postpone his claim in order that Martin might procure an extension from his creditors and avoid being closed up, and that Wehrung knew Martin for some time previous had been and was buying his business necessities for cash and without credit. (Transcript of Record, p. 81.) The statement volunteered by Wehrung that he would gladly have increased the loan is so preposterous as to discredit his other evidence.

We do not believe it possible to read in such testimony anything other than a reckless intent to disclaim every attribute of common sense in an effort to retain the preference.

(b) MANNER OF PAYMENT.

Martin's indebtedness was all past due. He was compelled to buy locally for cash. Any unusual method out of the ordinary course of business by which such a merchant raises a large amount of cash is sufficient to attract an alert creditor's attention.

Now, Martin did not sell this property. His connection with the sale was limited to the perfunctory signing of his name. Shortly after the transaction, involving as it did, his principal asset he *did not even know who was the purchaser.* (Transcript of Record, p. 63.)

In fact Martin did not know how much he owed Wehrung (Transcript, pp. 62-63). *It was all attended to by his attorney, Mr. Sweek, who was liable on one of the notes, and by Mr. Wehrung.* (Transcript, p. 63.) Mr. Sweek advised Martin that *there was no legal obstacle to the scheme.* (Transcript, p. 63.) Mr. Sweek, as endorser, had, of course, a *personal interest* in seeing these notes paid before the bankruptcy proceedings. At that very time *Mr. Sweek, acting for Martin, was offering other creditors twenty cents on the dollar!*

However, suppose we eliminate for the moment the unusual feature of the creditor finding a purchaser, and attending to the sale without the participation of the owner of the property. Surely it must be conceded that in the ordinary course of business the purchaser will employ his own attorney to examine the abstract and pass upon the other papers. Surely it is not the ordinary practice for a *creditor* who is not worried about an indebtedness and who, although not a personal friend, would in fact gladly at the time have loaned more money, to go to the expense of employing his own lawyer to render an opinion to the purchaser upon the title. That is what Mr. Wehrung did.

If those facts do not demonstrate that Wehrung knew the situation was a desperate one requiring quick action, without being particular about a little expense, then all human experience counts for naught, and any trick or scheme may be worked with impunity so long as the creditor is willing to mount the witness stand and unblushingly testify that although he had made many efforts to collect a four or five year old account, and in the end had secured a purchaser for his debtor's prop-

erty, and furnished a lawyer at his own expense to the purchaser, he was not in the slightest degree exercised about the account and in fact would gladly have made a larger loan. This same witness is frank enough to admit that it is not his custom to make presents or to abate a dollar of his demand. (Transcript, p. 50.) We omit laying stress upon the admission of Douty, the purchaser (a most unwilling witness), that *Wehrung told him that Martin was in bad shape, and badly in need of money.* (Transcript, pp. 33-34.) We are using circumstances which are *conceded,* and even if the attention is limited to conceded facts, we ask the Court whether a creditor not exercised about the insolvency of his debtor, ordinarily pursues a course like that of Wehrung, or whether Wehrung's method of handling this situation characterizes one who is seizing the single chance to get out whole and leave the other creditors "holding the bag?"

The Court in Heyman v. Bank, 216 Fed. 685, makes an observation which experience surely justifies:

> *"The unusual in business, as well as in other transactions, challenges the attention, and the failure of the bank to prosecute the prescribed inquiry cannot be permitted to inure to its benefit to the prejudice of the depositor's other creditors of the same class."*

And so in re: C. J. McDonald & Sons, 178 Fed. 487:

> *"The facts are so persuasive that they would have given reasonable ground for suspicion to persons far less astute and less accustomed to the ways of business in gen-*

eral than was the president of this bank. The unusual nature of the transaction, in connection with all the circumstances, raises such a presumption that it can only be overcome by proof on the part of the preferred creditor that he took the proper steps to find out the pecuniary condition of the debtor.

(c) WEHRUNG'S PARTICIPATION IN MARTIN'S REQUEST FOR EXTENSION.

An important admission of Wehrung's is with reference to the fact that when some time prior to the transaction complained of, Martin had found it necessary to apply to his creditors for an extension, Wehrung had been compelled to agree to postpone this particular claim. Surely this would put an alert banker upon inquiry. It should also cause an honest banker to inquire before grabbing the principal asset of the debtor, whether or not these claims had been paid, and this, Mr. Wehrung carefully refrained from doing (Transcript of Record, pp. 82-83). Without any such inquiry as to whether these claims had been paid or not (and as a matter of fact they had not been paid), Wehrung employs this scheme to get out whole. Can it be denied that that agreement was what Judge Sanborn in Coder v. McPherson called a "danger signal"? Can any man of Wehrung's intelligence and in Wehrung's position fairly claim that he was not anxious about the indebtedness under such circumstances?

(d) COINCIDENCE IN AMOUNT OF SELLING PRICE AND AMOUNT OF CLAIM.

Wehrung is a shrewd banker. Needless to say when

he has a solvent debtor who is paying a note he collects principal and interest and does not donate anything He admits this much.

We were struck by the remarkable coincidence in connection with the amount of the selling price of the property — $5875.00—and the amount of Wehrung's claim. Wehrung asserts that figuring the amount of principal and interest due on the notes on March 4, 1913, it totaled $5875, the difference not exceeding 35 cents.

We have tried to figure it in many ways, but we have found no method by which the amount of principal and correct figures as to interest, will come within $20 of the $5875. It is manifest that the interest figures are forced.

Taking it at its face value, Wehrung's admission that he would not donate anything, it is difficult to conceive of stronger evidence that Wehrung was taking what he could get and wisely, from his standpoint, refraining from collecting a few dollars' difference when he knew if he did not grab what was in sight quickly, he might, like other creditors, have to take ten or fifteen cents on the dollar.

(e) THE ACTUAL SITUATION.

Wehrung admits knowledge (at the time of obtaining the preference) of Martin's indebtedness to the extent of $50,000, aside from $8000 or $9000 to the United States National Bank. He was frequently in Martin's drug store. He knew that there was no cash on hand or in bank, and that Martin had had to ask extensions, etc., and a glance at the shelves of that drug store would suffice to demonstrate to him or any ordinary business man, Martin's insolvency. The careful liquidation of the as-

sets in bankruptcy netted a dividend of 10 cents on the dollar to creditors. So glaring an hiatus between bona fide assets and liabilities is a fact and circumstance to be considered. The Circuit Court of Appeals for the Sixth Circuit declared that one way to test the belief that should be imputed to a creditor is to ascertain what belief the facts actually warrant. (Carey v. Donohue, 209 Fed. 328.)

Martin's statement of Feb. 1, 1913.

The bulwark of the defense is the claim that on Feb. 1, 1913, Martin had rendered to Wehrung a statement showing that he was solvent. Apparently in the opinion of the trial judge, this testimony was sufficient to justify Wehrung in avoiding other avenues of inquiry, scrupulously refraining from any investigation and even failing to analyze the statement.

We quote again from the lucid opinion of the Court in Heyman v. Bank, 216 Fed. 685; 693:

> "True, the bankrupt was asked, "where he stood," and he replied, according to Mr. Castens, that "he was solvent." This is not an unusual response by a failing debtor. None more hopeful than an honest debtor of his ability to pull through a financial crisis; and it is not necessarily a discrediting factor that he alone believes his assets are sufficient to pay all obligations. *Such assertions, however, are not always to be taken at their face value and they seldom are by experienced business men. Actions speak louder than words, and their voice is not to be stilled by mere asservations.* The inquirer is not to rest content with mere assertions by the debtor that he is solvent, and perfunctorily making inquiries is no better than making none. His answers should be

> tested in the ordinary way to elicit the truth and the inquiry pressed with reasonable intrusiveness. In re John J. Coffey, 19 Am. B. Rep. 149; McGirr v. Humphreys Grocery Co. (D. C.), 192 Fed. 55, 26 Am. Bank Rep. 518. If he fails to do this he is chargeable with knowledge of the facts which such inquiry and testing would have disclosed, and, if such facts would have given him reasonable cause to believe that a preference would result from the transaction, such transaction will be voidable at the suit of the trustee. A bank cashier, than whom, because of exceptional opportunities and facilities to ascertain the financial standing of its customers, none is more competent to weigh assertions made by a customer, is not likely to be misled by such statements; and when, as in this case, he is possessed of the facts, which in their lesser effect cast doubt on its accuracy, his duty is to prosecute his inquiries further and not to halt them by the fear that an unsatisfactory disclosure would result."

See to the same effect:

> McGirr v. Humphrey, 192 Fed. 55.
> Stern v. Paper, 183 Fed. 228.

A concern, for instance, like the Clarke-Woodward Drug Company, located in Portland and close at hand, has a claim of $7,000 against Martin. It had tried, according to the testimony, strenuously, for a year or more, through attorneys and otherwise, to collect all or part of this sum from Martin, without success, and Martin had bought his immediate necessities for cash during that period. Along comes Mr. Wehrung and secures the principal asset on the eve of bankruptcy and in answer

to the charge that he has violated the spirit of the Bankruptcy Act, in so doing Mr. Wehrung is permitted to shield himself behind a statement secured by him from Martin, a month or more previously. That statement is, of course, admissible in evidence, but we submit that the trial court paid it an excess of deference in comparison with the treatment accorded the striking circumstances attending the collection.

With all deference to the trial judge in the case, for whose ability we have the most unbounded respect, we submit that no banker or business man, and that is the standard by which Wehrung is to be judged, would for a moment consider Martin solvent, even on the grossly false statement of Feb. 1, 1913.

The trial court indicated its belief (Transcript, p. 77) that a banker like Wehrung would have the right to take such a statement and rely upon it without making any inquiry or investigation, and consider it at its face value apparently without question. It is also clear from the interpolations of the trial judge that while he correctly believed that the value of Martin's assets was to be considered in the light of Martin's business as a going concern, he also seemed to consider that this meant the original cost price, etc., of old merchandise and fixtures, and the face value of accounts.

We are, of course, far from contending that the values are to be figured on a wreckage basis. We do contend, however, that they are to be computed not on original cost, but on the fair market value. As pointed out by the Court in Stern v. Paper, 183 Fed. 228:

> "Fair valuation within the meaning of subdivision 15 of section 1 of the Bankrupt Act, means a value that can be made

> promptly effective by the owner of the property to pay his debts. That is the language of this liberal statute. It ought not to be enlarged. Such a value excludes, on the one hand, the sacrifice price that would result from an execution or foreclosure sale, and, on the other hand, the retail price that could be realized in the slow process of trade. This latter value should be excluded because it could only be gained by large expense and the many risks of a mercantile venture. "Fair valuation" means such a price as a capable and diligent business man could presently obtain for the property after conferring with those accustomed to buy such property. Such a value will depend upon many circumstances, such as the age and condition of the stock, the season of the year, and the state of trade."

Here is a statement showing $50,000 of liabilities, all of which were past due, and *not a dollar of cash on hand or in bank with which to pay them.* (In addition to that there was apparently some eight or nine thousand dollars due the U. S. National Bank not computed, but as to which Mr. Wehrung was advised.)

There was no money available and it is hardly fair to figure values on the basis of original cost or over-the-counter business. The creditors must be paid and the assets converted into money. What were the assets out of which these creditors were to be paid?

An old postal card and drug stock. Any business man, even though not a banker, knows that the best of stocks would not have a market value exceeding 75 per cent of the original cost. And in the case of an old drug and postal card stock 50 per cent would be an extreme

allowance, and Wehrung well understood that. The question was whether or not Martin was solvent, and there is only one way of determining that, and that is, to consider whether or not his assets at a fair market value would realize sufficient to liquidate his liabilities, and we assert that no man in Wehrung's position would be guilty of the folly of believing that a fair market value of that drug and postal card stock was 100 per cent of what it had cost some indefinite time previously.

There were also fixtures listed at about $7,000, original cost. Wehrung had the *audacity* to testify that fixtures often bring (outside of goodwill or any other consideration) more than the original cost. *Surely a Judge is not required to silence every bit of common sense and experience and swallow statements such as that.* If there has ever been in the history of commercial transactions any fixtures which have been used for a long time in a store, of which the fair market value is the original cost, the history of the liquidation of assets has been silent on the subject. It is rare that 25 cents on the dollar can be realized. Certainly 50 cents on the dollar, or $3500, for the fixtures would be a liberal estimate.

(Mr. Wehrung made no inquiry as to whether these fixtures were paid for, and disclaims knowledge of the fact that Martin in reality had no title whatsoever to them, same having been purchased under a conditional bill of sale.)

Again, we have the old accounts. In considering the fair market value of these, Mr. Wehrung estimated it at 90 per cent. This allows 10 per cent for losses and cost of collection! If any concern which has been in business a long number of years and has a lot of old accounts can get 90 cents on the dollar net for them,

it will certainly be a most gratifying experience. However, figuring the accounts at 90 cents on the dollar, the stock at 75 cents and the fixtures at 50 cents, we would have a shrinkage of $14,618.12. In the light of such an analysis which any ordinarily prudent man would make of the statement, false as it was, Martin was insolvent. It will be noted that we are making no computation of the *expense of liquidation* which would have to be considered in determining the fair market value of assets of this character of which it is so notoriously difficult to effect an advantageous sale.

We submit that the trial judge was wrong in assuming that a creditor can take any sort of a statement at its face value. Such a view would permit a facile method of rendering a preference inviolable. As said by Black in his work on Bankruptcy, Section 599, referring to the duty of a creditor to prosecute a reasonably diligent inquiry to ascertain the truth:

> "As to the kind of investigation to be conducted by a creditor thus 'put on inquiry' his duty is not discharged by inquiry addressed to the debtor alone, at least if any better or more reliable sources of information are open to him."

The trial court (Transcript, p. 77) apparently differentiated between a loan about to be made on the faith of such assets and a loan already made. We are unable to see any basis for this distinction where the inquiry is whether or not there was reasonable cause to believe a debtor insolvent. If Wehrung had been about to make a loan he would consider the question of solvency and in so doing would consider the fair market value of the fixtures, etc., and not the original cost.

The trial judge believed (Transcript, p. 77) that the question was whether Wehrung did or did not have the right to assume that Martin was solvent on the basis of that statement *"and nothing* else." But there was *"something else."* That something was that Wehrung had been trying for some time to collect his claim and that he had been compelled to consent to the extension and even to postponing his claims to that of Eastern creditors, and there was also the curious chain of circumstances connected with the final method of collection.

* * * * *

In spite of the fact that in considering the existence of reasonable cause to believe that a preference is taking place, all the decisions to which we have had access have pointed out the important bearing of unusual circumstances, the trial court in this case apparently considered it beside the mark as to whether or not the purchaser, Douty, had his title examined, or accepted as a substitute, an opinion procured by Wehrung at his own expense from his own attorney. (Transcript, p. 40.)

We have already cited authorities with regard to the significance of "unusual" circumstances. We beg to quote somewhat liberally, however, from the well-reasoned case of Stern v. Paper, 183 Fed. 228:

> "We must also consider in passing upon this branch of the case, the transaction which is charged as a preference. *It was extraordinary in its character.* The defendants themselves are merchants, and must have known that other creditors would not stand by and permit a

large part of Naftalin's stock to be appropriated to a single creditor without immediately pressing their claims to judgment and execution.

* * * * *

All these facts suggest strongly that both the defendants and the bank saw that the end of Naftalin's mercantile career was at hand, and called for the payment of the note in order that the defendants might have an opportunity to protect themselves before the crash came. About two weeks after the sale to defendants, a Mr. Tilly, who had been their attorney, was employed by the bankrupt to visit his creditors and try to make a settlement with them on the basis of 20 cents on the dollar. Forty days after the sale Naftalin was adjudged a bankrupt.

Do the circumstances and evidence above narrated show that the defendants had reasonable cause to believe that the transfer was intended as a preference? The authorities tell us that section 60 of the bankruptcy act does not, on the one hand, require actual knowledge or actual belief of an intent to prefer (in re Eggert, 102 Fed. 735, 43 C. C. A. 1; in re Virginia Hardwood Mfg. Co. (D. C.) 139 Fed. 209) and, on the other hand, that mere fear or suspicion of a preference will not invalidate a transfer (Powell v. Gate City Bank, 178 Fed. 609, 102 C. C. A. 55). Thus between actual knowledge and actual belief, on the one side, and fear and suspicion, on the other, lies the 'reasonable cause to believe' mentioned in the section. This classification however, is not as helpful in the decision of a concrete

case as it appears. *Fear and suspicion of insolvency, if they be strong enough, become belief,* and the difficulty with the classification is that there are no criteria by which it can be said that one set of facts ought to engender fear or suspicion only, while another set of facts furnish reasonable cause of belief. It is impossible to group the ever-changing facts of business life into hard and fast categories, and say that one category produces fear, another suspicion, and another belief. * * * 'Reasonable cause to believe,' under section 60 of the bankruptcy act, covers substantially the same field as 'notice' in determining whether a person is a bona fide purchaser of property. Hence, under this statute, 'notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop.' Coder v. McPherson, 152 Fed. 951, 82 C. C. A. 99. But if a party has knowledge of facts which cause him to fear or suspect that a transaction into which he is entering will work a preference, that knowledge as a rule will at least be sufficient to put him upon an inquiry which if prosecuted would disclose the real character of the transaction. It *follows, therefore, in my judgment, that the doctrine that fear, or suspicion of a preference is not sufficient to invalidate a transfer must have a restricted application under our present bankruptcy law.*

What constitutes 'reasonable cause to believe,' under this section, is a pure question of fact, and each case is best disposed of by an independent consideration of its own facts. The attempt to apply the doc-

> trine of authority to such questions simply results in exalting a few facts that have been emphasized in the first decision so as to bring the second case within its scope, and overlooking the other facts which ought possibly to determine the second, case. What the statute requires is that the facts and circumstances known to the purchaser shall be ascertained, and then the question answered whether those facts and circumstances would have caused an intelligent business man to believe that a preference was intended, or would have put such a man upon an inquiry that would have discovered the true character of the transaction." (Italics ours.)

To our mind, with all deference, it seems quite significant that a creditor in order to collect his debt, should become a real estate agent and even employ his own lawyer to examine and pass upon the title, especially in the light of that creditor's testimony that he was not worried about the debt, and in fact would have been glad to lend more money. Wehrung's conduct is to be judged by that of an ordinarily prudent and sagacious business man of his calibre, and we ask the court in considering this question to place itself in the position of such a sagacious business man and ask itself whether or not this and other circumstances do not clearly disclose the fact not only that Wehrung knew he was getting a preference, but that there was no time for dallying or for letting the transaction work out along the usual lines involving the usual delays.

* * * * *

In conclusion, we earnestly urge that if creditors

generally are to have the assurance vouched for in in re Blount, 142 Fed. 263:

> "The main object of the Bankruptcy Act is to secure an equal distribution of the assets of an insolvent among all his creditors, and prevent preferences. And it is the duty of the courts to carry this principle into effect to the extent which the language of the act justifies. Schemes and artifices to evade the letter and spirit of the law will not be tolerated."

no such thin and transparent sequestration of assets of a designedly favored creditor can be permitted to stand. If the only solace for the creditors getting a 10 per cent dividend is the statement that in a proper case parity will be preserved but that the significant circumstances of this case were not sufficient to demand inquiry and explanation and create unfavorable inferences, then the words of Shakespeare are well applicable to the parity sections of the Bankruptcy Act:

"And be these juggling fiends no more believed,
That palter with us in a double sense;
That keep the word of promise to our ear,
And break it to our hope."

Respectfully submitted,
BEACH, SIMON & NELSON,
For Geo. M. Healy, Trustee, etc.

INDEX

NO. 2575

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEO. M. HEALY, as Trustee in Bankruptcy of the Estate and Effects of H. J. Martin,
Plaintiff-Appellant.

v.

W. H. WEHRUNG,
Defendant-Appellee.

BRIEF OF APPELLEE.

Upon Appeal from the District Court of the United States for the District of Oregon.

J. F. SHELTON,
H. T. BAGLEY,
Attorneys for Appellee.

BEACH, SIMON & NELSON,
Attorneys for Appellant.

H. C. Browne & Co., Printers, Portland, Ore.

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v.

W. H. WEHRUNG,
Defendant-Appellee.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

Appellant commenced this suit in the United States District Court for the District of Oregon, to recover a certain sum of money from the appellee, alleged to have been transferred or paid to the appellee by H. J. Martin, a bankrupt, while insolvent,

and within four months immediately preceding the filing of his petition in bankruptcy.

The case was put at issue by the pleadings and tried before the Hon. Robert S. Bean, District Judge presiding in said court; testimony was adduced before the court and the court, being fully advised in the premises, on the 11th day of June, 1914, ordered, adjudged and decreed that the bill of complaint be dismissed and that said defendant (appellee) do have and recover of and from said plaintiff (appellant) his costs and disbursements.

ARGUMENT.

It is admitted in the pleadings and proof in this case that on the 25th day of March, 1913, H. J. Martin filed his petition to be adjudged a voluntary bankrupt in accordance with the Acts of Congress known as "The Bankruptcy Act of 1898," and Amendments thereto, and that on the same day, Martin was duly adjudged a bankrupt.

It is also admitted in the pleadings and proof that on the 4th day of March, 1913, and within four months of the filing of said petition, said H. J. Martin paid to the appellee herein the sum of $1473.20 to be applied and the same was applied upon an indebtedness of said bankrupt due to appellee, said indebtedness being evidenced by two certain promissory notes, designated in the Transcript of Record as "Trustee Exhibit 1" and "Trustee Exhibit 2," set forth on pages 55, 56 and 57 of the Record.

As this is a suit to set aside a preference and recover the value thereof, it is first necessary to determine the elements of a preference, and then to determine upon what grounds a preference may be avoided.

As applied to the facts in the case at bar, a preference consists in a person,

First: While insolvent;

Second: Within four months immediately preceding the filing of his petition to be adjudged a bankrupt;

Third: Making a transfer of his property;

Fourth: The effect of which will be to enable one creditor to obtain a greater percentage of his debt than any other creditor of the same class.

It is necessary that these four essential elements be established by competent evidence before the court can say as a matter of fact that a preference was given, and the burden of establishing the fact that a preference was given rests upon the appellant who is seeking to avoid it.

The second and third elements having been admitted by the pleadings, it is still necessary that the first and fourth element be established by competent evidence.

The appellant must not only establish that a preference was given, but he must go further, in order to avoid that preference, and show that the person receiving the preference had reasonable

cause to believe that the transfer or payment would effect a preference.

The payment of the money by Martin to appellee being admittedly within the four months' period, there is really only two questions of fact to be determined by the Court.

First: Was Martin insolvent at the time he paid the money to appellee?

Second: Did appellee at the time have reasonable cause to believe that said payment would effect a preference?

MARTIN'S ASSETS.

Under Section 1 (15) of the governing bankrupt act, a person shall be deemed insolvent whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts.

Where property is transferred in payment of a just debt, the mere fact that it may involve a preference in bankruptcy, should bankruptcy proceedings be instituted, does not exclude it from consideration in determining the debtor's solvency.

> In re Doscher (D. C., N. Y.) 9 Am. B. R. 547, 120 Fed 408, at page 414.

In the case at bar, then, the value of the property transferred in payment of the debt ought to be

added to the value of all other property of the debtor to determine the fair valuation of the debtor's property.

As the property transferred by Martin to appellee was a sum of money amounting to $5875.00, we may safely say that the fair valuation of the property transferred was $5875.00.

At the time this money was paid, Martin was conducting, and was the owner of, a drug store and post-card business in Portland, Oregon; and owned a stock of goods and fixtures in the drug store and a stock of post-cards and fixtures in the post-card business, and certain outstanding accounts due or unpaid for stock sold in the regular course of business.

Martin also at said time owned his home in Portland, Oregon, worth probably $10,000.00, so far as the evidence in the Transcript of Record discloses. (Record, page 84.)

The record is silent as to whether or not Martin owned any other assets at that time, and although Martin was a witness on behalf of the Trustee (see Record, pages 61 to 65), no attempt was made to show that he owned no other assets. He was not even asked the question; and clearly the Court cannot assume that he had no other assets.

See, on this point, Tumlin v. Bryan (CCA 5th Cir.) 165 Fed. 166, at page 167, where the court, speaking through Shelby, Circuit Judge, said:

> "The case turns on the contention of the defendant that there is no suffi-

> cient evidence to sustain the decree showing that the bankrupts were insolvent at the time the payments were made. * * * "

The Court then states the rule to determine insolvency as defined in Section 1 (15) of the governing bankrupt act, and continues:

> "The complainant, as a witness for himself, in answer to a question which assumed that he had gone through the books and familiarized himself with the condition of affairs of A. B. Tumlin Company, testified that 'They were insolvent in my opinion;' the answer referring to their condition on July 1, 1906, about the time the payments in question were made. *He was not asked what property the firm owned,* nor its value, nor the amount of the firm's debts. * * * *It is not shown what property was owned by the firm in July, 1906, at the date of the payments,* nor is the value of the property then owned by it proved."

It appears also that the Trustee was a witness in his own behalf, but he was not even asked what property Martin owned at the time appellee was paid the money, neither does it appear that the Trustee made any investigation to ascertain whether Martin owned any other property at that time.

Martin may have had ample property at the time he paid appellee this money, and sold and disposed of it subsequently and prior to the filing of his involuntary petition; in which event, it would

never have passed into the possession of the Trustee, and unless the Trustee presented some evidence tending to show that no transfer of property was made during that period of time, he could not claim that the property which did come into his possession subsequently, was the only property Martin had a month or so previously.

As was said by the learned referee, whose language was adopted by the court in the case of In re Chappell (D. C., Va.) 7 Am. B. R. 608, 113 Fed. 545, at page 547:

> "The company might have been solvent on October 17th, and hopelessly insolvent two weeks later. The bankrupt, Jno. A. Chappell, might have been insolvent on the 8th of November, 1900, the day on which he filed his petition and was adjudged a bankrupt, and yet solvent during the period of time from July 13 to November 1, 1900, covering the several payments in the trustee's petition mentioned."

There is no evidence to show what the different items of property which made up the drug stock or the post-card buisness or the fixtures consisted of on March 4, 1913, the date Martin paid appellee—and the only evidence which in any manner refers to that property relates to the time when it was in the possession of the Trustee.

The Trustee took possession of the goods and made an inventory, just what date does not appear, but it nowhere appears in the Record that the prop-

erty as inventoried by the Trustee was all the property Martin had on March 4, 1913, in fact, the record discloses the contrary, for it does appear that between March 4, 1913, and March 25, 1913, the date Martin was adjudged a voluntary bankrupt, he was operating and carrying on both his drug business and post-card business, thus naturally leading us to conclude that he was selling various and divers articles of his stock in trade.

VALUE OF ASSETS.

In order to determine whether or not Martin was insolvent on March 4, 1913, the fair valuation of the assets must be ascertained.

As stated above, the fair valuation of the money paid to appellee was $5875.00 and the valuation of Martin's home was $10,000.00.

There is no attempt to determine the valuation of the drug stock and fixtures or the post-card stock and fixtures or the outstanding accounts due or unpaid to Martin on March 4, 1913.

The Trustee has, however, adopted an ingenuous method to determine the value of this stock—and the same method to determine Martin's insolvency on March 4, 1913.

It is this: The bankrupt estate, which came into his hands as Trustee, was inventoried, appraised and sold by the Trustee, and after paying some preferred claims and a 5% dividend there remained cash on hand in the sum of $2882.00 only. The Trustee adopts the amount he sold the estate

for as the valuation thereof, a month before he took possession of it; and then, in effect, says that the claims proved in bankruptcy amounted to $49,-534.00, and that the total indebtedness, as shown by the schedule in bankruptcy, amounted to $69,742.00. Hence, because of the fact that the amount of money realized on the bankrupt estate in liquidation in bankruptcy was insufficient to pay the claims proved, the bankrupt was insolvent on March 4, 1913, the time he paid appellee the money. There is no other evidence of the value of the drug stock, the post-card stock, the fixtures or the outstanding accounts at any time.

The inventory and appraisement is not a part of the Record, nor is the schedules filed by Martin with his petition, and hence the contents of those instruments cannot aid us in arriving at any conclusion.

Clearly the contents of the inventory and appraisement, if in this record, would have no bearing whatever in determining the value of the assets on March 4, 1913, nor would the contents of the schedules of assets aid us any, for the valuation, if any, which might be shown by the schedules, would not be considered in determining a fair valuation at an earlier date.

In the case of Tumlin v. Bryan, 165 Fed. at page 167, the Court said:

> "The schedules filed by the bankrupt firm December 27, 1906, are relied on as showing insolvency of the firm

> in July, 1906. If from these schedules and the dates of accounts listed it be conceded that the firm's indebtedness in July, 1906, may be ascertained, and that other schedules show the property owned by the firm at the time of the bankruptcy, this is not sufficient. It is not shown what property was owned by the firm in July, 1906, at the date of the payments, *nor is the value of the property then owned by it proved.*"

The only evidence in any manner relating to the value of the store stocks, accounts and fixtures at any date prior to the adjudication was given by appellee and disclosed in Defense Exhibit B shown on page 71 of the Record, appellee's testimony as to value being based upon that Exhibit, and given in his testimony relative thereto.

Defense Exhibit B is a "Joint Statement" made by Martin on February 1, 1913, and handed to appellee by Martin close to that date (Trans., p. 69). Counsel for appellant, in his brief, page 23, says this statement was false, but there is not one word of testimony in the entire Transcript of Record, directed towards even attempting to establish its falsity.

The statement upon its face purports to show Martin's assets and liabilities, February 1, 1913.

The value of the assets are based on the "inventory price—the original cost price." (Trans., p. 73.)

None of Martin's assets, except the drug store and the post-card inventory of goods and accounts,

was included in this statement—no real property whatever. (Trans., p. 70.)

All valueless stock—that is, stock so depreciated in value as to become practically unsalable—had been set aside and allowance made for that in this statement. (Trans., p. 73.)

The inventory or original cost price is a fair valuation (Trans., p. 74) to put on the stock of goods.

The fixtures are worth cost price (Trans., pp. 75 and 76).

The outstanding accounts were worth 90 cents on the dollar (Trans., p. 79).

In the light of these facts the value of the stock in trade may in a measure be ascertained.

The value of that portion of the assets shown in the statement is		$57,354.22
From this should be deducted 10% of the outstanding accounts, or the sum of		997.13
Leaving as the value of the stock in trade		$56,357.09
Add to this the value of the real estate:		
Washington County land	$ 5,875.00	
Martin's home	10,000.00	
	$15,875.00	15,875.00
Total value of assets disclosed in record		$72,232.09

LIABILITIES.

The amount of the liabilities of Martin existing on March 4, 1913, is not ascertainable with any degree of definiteness from this record.

The Trustee, on pages 22 and 23 of the Transcript, testified that the amount of the claims proven in bankruptcy was $49,534.00. These claims were not introduced in evidence, and we are unable to ascertain from any testimony in the record when the indebtedness, evidenced by the claims, originated, or what part of it, if any, existed on March 4, 1913, or what part of it, if any, originated subsequent to March 4, 1913. These claims were in the possession of the Trustee or the Referee and could have been introduced. They were available in the hands of the Trustee. We can only presume they were not introduced as evidence for the reason that the contents would disclose facts adverse to the contention of the Trustee.

The Trustee also testified (Trans., p. 23) that the indebtedness of the bankrupt, as shown by the schedules in bankruptcy, was $69,742.00, but the schedules were not offered or introduced in evidence. We cannot, therefore, ascertain what the contents were, or whether or not the time the debts originated was shown in the schedules, or whether or not any of those debts existed on March 4, 1913.

This testimony is clearly incompetent to show what indebtedness existed on March 4, 1913.

The only indebtedness shown at that date is the

debt of $5190.00 (Trans., p. 25) due Woodard & Clarke, and the indebtedness evidenced by the promissory notes known as Trustee Exhibits 1, 2, 3 and 4 shown on pages 53 to 59 inclusive of the Record and Trustee Exhibit 5 shown on page 94, amounting to $5875.00.

There is no other evidence in the record as to any indebtedness on March 4, 1913, unless the "Joint Statement" (Trans., p. 71) rendered by Martin to appellee under date of February 1, 1913, may be considered as throwing some light on the question.

As to indebtedness shown in this statement, appellee testified (Trans., p. 70-71) that an indebtedness of about seven or nine thousand dollars to the United States National Bank, included in the indebtedness shown in the statement, had been subsequently taken care of—that is taken care of subsequent to the time of the making of the statement and the date it was handed to appellee.

This indebtedness of the United States National Bank ought to be deducted from the total liabilities shown in the statement.

Total liabilities shown in the statement	$51,184.39
Deduct U. S. National Bank indebtedness paid	7,000.00
Leaving a balance of liabilities	$44,184.39

WAS MARTIN INSOLVENT ON MARCH 4, 1913?

Value of assets above disclosed	$72,232.09
Total indebtedness	44,184.39
Value of assets over liabilities	$28,047.70

The above summary of assets and liabilities is based upon the "Joint Statement" when considered in connection with other testimony in reference thereto, under the theory that the statement, although made on April 1, 1913, may be some evidence of the value of the assets and the amount of the liabilities on March 4, 1913.

If the statement is not admissible for that purpose, then there is an absolute want of any proof of the *fair valuation* of the drug and post-card stock and fixtures and outstanding accounts on March 4, 1913, and an absolute want of any proof showing any indebtedness existing on March 4, 1913, except the debts due Woodard & Clarke in the sum of $5190.00 and the debts evidenced by the Trustee Exhibits, amounting to $5875.00; and we would summarize the assets and liabilities as follows:

Total value of assets disclosed by Record	$15,875.00
Total indebtedness	11,065.00
Excess of assets over liabilities	$ 4,810.00

The latter summary does not take into consideration any value which may be placed upon the store and post-card stock and fixtures and outstanding accounts.

The mere fact that Martin filed his voluntary petition to be adjudged a bankrupt is not of itself sufficient to establish the fact that he was insolvent on the date the petition was filed, much less at an earlier date. This is well illustrated in the case of In re Chappell (D. C. Va.) 7 Am. B. R. 608, 113 Fed. 545, at page 547, where the following language is used:

> "Any person owing debts, as defined in Section 1 (11) may file a voluntary petition. The present act does not in express terms require that the person shall be insolvent, or unable to pay all his debts in full, as did the Act of 1867; and there seems to be no reason why, if a solvent person cares to have his property distributed among his creditors in bankruptcy, he should not be allowed to do so. It will not be necessary to allege insolvency in the petition, nor to prove it, to procure an adjudication."

The above language was quoted by the Court from Coll. on Bankr. (3rd Ed.), page 46. The Court then continues:

> "If this careful text writer is correct, and he appears to be, in his statement that a solvent person may be adjudged a voluntary bankrupt, the adjudication, so far from creating, as contended by the trustee, a presumption that the bankrupt was insolvent during the period of four months before the filing of his petition, does not even show that he was insolvent at the date of the filing of the petition. It is

> true that the bankrupt in his petition alleged that he owed debts which he was unable to pay in full; but as Mr. Collier says, this was an allegation neither necessary to be made nor necessary to be proved. Let us, however, for arguments sake, assume that the adjudication established the fact of insolvency on the 8th day of November—the date of the filing of the bankrupt's petition and of the adjudication. This fact alone, whilst consistent with, did not show, insolvency at a previous date."

Appellant's counsel in their brief in the "Statement of Fact" on pages 1 and 2, make the assertion that "on the 4th day of March, 1913, Martin was heavily involved and utterly insolvent"; this utterance, as we have seen, is not based on the facts disclosed by this record. If that was the fact, it seems to us appellant had every opportunity to establish it. All the books, papers and documents of the bankrupt were in his possession, the claims proven in bankruptcy, the schedules of both assets and liabilities, were in his possession, and the bankrupt, himself, was on the witness stand; yet, in the face of all these facts, and in the face of the fact that Mr. Nelson, one of appellant's counsel, on page 18 of the Transcript, said: "It is up to me to show insolvency at that time"; there is not one word in the record which even tends to show that the store and post-card stock, fixtures and outstanding accounts, the home and the Washington County property was all the assets that Martin owned on or prior to March 4, 1913, or what the fair valuation of

the property on that date was, or what the liabilities were, if any, on that date, so that the difference between the aggregate of the liabilities and the aggregate of the assets could be ascertained and thus Martin's solvency or insolvency determined.

DID APPELLEE HAVE REASONABLE CAUSE TO BELIEVE THE PAYMENT OF THE MONEY TO HIM ON MARCH 4, 1913, WOULD RESULT IN A PREFERENCE?

If Martin was not insolvent on March 4, 1913, when he paid appellee the money, then, of course, a preference, as defined by Section 60-a, would not result, and therefore appellee *could not have reasonable cause* to believe that the payment would effect a preference.

Should this Court, however, find from the evidence that Martin was insolvent on that date, and that a preference was given, then, the question as to whether or not appellee did have reasonable cause to believe a preference would result becomes material.

In this light we will consider the question of *reasonable cause to believe.*

The witnesses are few in number, and their testimony short. Trustee Healy testified that he did not know appellee (Trans., p. 26) and that he never had any conversation with appellee (Trans., p. 30).

Not a word of the Trustee's testimony tends in any manner to connect appellee with knowledge of any kind in relation to Martin's condition finan-

cially or otherwise on March 4, 1913, or at any other time, or with notice of anything which ought to lead appellee to investigate.

Alex Sweek's testimony does not touch the question. Mr. Martin, the bankrupt, was not even asked about any fact which might tend to shed light on the question.

This leaves only the testimony of Douty and appellee to be considered.

Douty's testimony is silent as tending in any manner to elucidate whether or not appellee was possessed of any information regarding Martin's financial condition, except as to the pendency of a certain damage suit, upon which a decision was shortly expected adverse to Martin (Trans., p. 33).

Whether or not such a damage suit was pending in the courts may be somewhat uncertain of ascertainment from the Record, but Martin says (Trans., p. 63): "I had this—if you mean this damage suit"; but nowhere else is it referred to, nor does it appear what disposition, if any, was made of it, if it was in fact pending at that time.

Appellee testified (Trans., p. 89) that this statement by him to Douty had no connection whatever with the sale of the Washington County property to Douty except to "puff the land" and this fact is undoubtedly made clear from the whole testimony of Douty and appellee, for appellee, at that time was in possession of the "Joint Statement" (Defense Exhibit B), knew the facts therein disclosed and had talked with Martin about it—what assets were

not in the joint statement and what debts shown therein had been paid. Appellee, therefore, knew at that time that Martin's assets, as disclosed by the statement and his subsequent investigation in verification thereof, amounted to $72,232.09, and that his total liabilities were $44,184.39. Although, the statement, itself, clearly showing Martin's solvency, no notice was thereby imparted requiring further investigation on appellee's part; appellee, nevertheless, did investigate by checking over the statement with Martin (Trans., p. 84); and found by Martin's statements that no real estate whatever—either the Washington County property or Martin's home—was included in the statement as an asset, and that about seven or nine thousand dollars included in the statement as liabilities had been paid subsequently, thus increasing the assets by about $15,000 or $16,000, and reducing the liabilities by about $7000.00 or $9000.00, thereby ascertaining that instead of Martin's surplus as shown in the statement being only $6169.83, it was in fact from $22,000.00 to $25,000.00 greater.

Appellee was in possession of these facts when the National Bank Examiner, in February, 1913 (Trans., 91-92), requested his bank to liquidate the Martin note (Trustee's Exhibit 4) and confine its loans to its own territory. Appellee up to that time never made any demand that those notes be paid (Trans., p. 91), apparently, at least, being satisfied with the loans and the regular and frequent interest payments as disclosed by the endorsements on the

notes themselves (Trustee's Exhibits 1, 2, 3, 4 and 5).

We anticipate, although not bankers, that every bank makes some effort to comply with the lawful demands of the National Bank Examiner, and what would be more natural than for appellee, who was the president of the Hillsboro National Bank, to request or demand of Martin the liquidation at least of the bank note and the note due him individually, for in order to comply with the real spirit and intention of the bank examiner's order or request, the president of the bank ought to, himself, confine his own loans within the local territory, or else the bank itself might thereby be placed in a false position with the examiner. In this connection it must be remembered that appellee was the payee named in all of the notes, except the one given direct to the bank.

Appellee's business career had been confined very largely to the mercantile business and his banking experience was limited to recent years. It is very probable, therefore, that he attached a great deal of importance to the bank examiner's request, and felt that no attempt should be made to evade or surmount the order, and therefore concluded, as all of those notes were either made to the bank or to himself (he being the president of the bank), he should call them in, and therefore did do so.

The record is extremely vague as to the exact time appellee first demanded payment of the notes, but in the natural course of events, we may very

properly assume that it was some time in February, 1913, and subsequent to the bank examiner's request (Trans., p. 91). The natural course would have been for appellee to request payment of the notes by Martin. He probably did this and it is quite probable, from subsequent events, that Martin told him he could not liquidate at that time. Although the Record fails to disclose, we may likewise naturally conclude that Martin told appellee then that if he could find a buyer for the Washington County land, he would liquidate the notes, for appellee says, "My actual reason for making the sale was to pay myself." (Trans., p. 90); and on page 91 of Transcript further says, "When I came to make collection is when I asked for the money; when this land business came up * * *"

Along in the latter part of February, appellee told Douty that he had a good investment; knew where there was a good investment in Washington County up near Beaverton, and wanted to know if Douty knew of anybody that wanted to buy acreage. Douty asked appellee some questions about it and appellee told him about the acreage that was there, and appellee said, "Well, it could be bought for $150.00 an acre," and thought it was a good buy at that price. Douty then told appellee he might take it himself if it was a good buy (Trans., p. 31-32). Douty did finally purchase the property at $150.00 an acre—46.57 acres, and paid Martin by certified bank check $5875.00, after deducting from the total amount of the purchase price, the amount of a

mortgage against the place and accrued interest and delinquent taxes (Trans., p. 41).

Martin then paid the money over to appellee in liquidation of the notes.

The sale seems to have been consummated in the usual course. Appellee told Douty of the land and the fact that he thought it was a good investment some time the latter part of February. Douty took his time to investigate and arrived at the conclusion that it was a good investment; some three or four days later, appellee called Douty up over the telephone and asked him if he had been out to see the land, and Douty told him he had and would take it if the title was all right, and further told appellee to have everything prepared for the closing of the deal and to let him know when he was ready. Douty was satisfied when the deal was closed, and the evidence as to whether or not Douty hired his own lawyer to pass on the abstract or accepted as final a written opinion of Attorney Bagley, who was appellee's attorney, can have no bearing on the question of "reasonable cause to believe," unless a claim, at least, was made by appellant that appellee and Douty were in collusion, and no such claim is made, nor does the record disclose any basis for such a claim.

Douty purchased the land in good faith through the efforts of appellee who was conscientiously endeavoring to secure the liquidation of the indebtedness so as to comply with the request of the National Bank Examiner.

We cannot bring our minds to the conclusion that this sale was a "hurry up" sale, and that it was "hurriedly" consummated by appellee in the full knowledge and belief (as appellant's counsel seem to think) that Martin was upon the brink of ruin, and was insolvent and a bankrupt, for the reason that the conclusion does not square with the facts.

The only facts in the possession of appellee showing Martin's financial condition were those disclosed by the "Joint Statement," Defense Exhibit B, and by Martin when appellee asked him relative to said statement.

This was not the only statement which Martin gave to his creditors, for it appears in evidence that he rendered a statement of his assets and liabilities to the Woodard-Clarke Co. (Trans., pp. 66, 67).

This statement, according to the Trustee's testimony, showed Martin's net worth to be $14,805.00; and we doubt not that the money which Martin owed the United States National Bank (which appellee says was about $7000.00 or $9000.00) was not included as a liability in that statement for the reason it had been paid. If the exact amount paid the U. S. Bank was disclosed and added to the "surplus" shown in Defense Exhibit B of $6169.83, the amount thereof would, in all probability, equal the "net worth" shown in Woodard-Clarke statement, thus corroborating the authenticity of appellee's understanding.

ANSWERING APPELLANT'S ARGUMENT.

Appellant's counsel, in their brief, page 6, in stating the four elements necessary to constitute a voidable preference, say:

> "Fourth, there must have existed at the time of the transfer reasonable cause for the creditor to believe that it would result in a preference."

There is a wide difference between the "existence of a state of facts" which if known to the creditor would produce reasonable cause to believe, and "the creditors knowledge of facts" which would produce reasonable cause to believe.

The language of the Act, Section 60-b, is:

> "And the person receiving it, * * * shall then have reasonable cause to believe that the * * * transfer would effect a preference."

The creditor must have knowledge of some fact that would put him, as an ordinary prudent person, upon notice, but this fact must be brought home to him, and the mere existence of the fact, if not known to him, would not be sufficient.

Counsel say (Appellant's Brief, p. 7) the first, second and third elements of a preference are not disputed. We do seriously dispute that Martin was insolvent on March 4, 1913, or that the effect of the payment made to appellee was to create a preference, and think we have fully shown the want of

any competent testimony to establish that Martin was insolvent at that time.

The whole theory of appellant's brief seems to be based upon the "existence of a state of facts" and makes no pretense at showing that appellee had knowledge of the existence of those facts.

Appellee knew nothing of any creditors' meeting—in fact, the meeting of creditors was held just a short time before Martin filed his petition in bankruptcy (Trans., p. 18) and undoubtedly after March 4, 1913.

If Sweek knew anything about the alleged creditors' meeting, he never disclosed any fact in relation thereto to appellee, for appellee testified (Trans., p. 90) he had no business with Sweek whatever. Sweek was on the witness stand as appellant's witness and was asked nothing in relation to that subject.

Counsel lay considerable stress on some agreement whereby appellee was to postpone the payment of his debts until some of the other creditors were paid (Trans., p. 45-80) (Appellant's Brief, p. 13), but the testimony shows that whatever that agreement or understanding was, it was made along in 1911, shortly after some losses had been made by Martin at the Seattle fair, and that appellee was to wait for one year. The year had expired long before the present transaction, and Martin was continuing to do business. Surely some slight "flurry" among some of Martin's creditors two years prior could not have the effect of charging appellee with

notice of insolvency on March 4, 1913, in the face of appellee's knowledge acquired from the "Joint Statement" and Martin's disclosure with relation thereto?

It seems to us that the lower court "hit the nail right square on the head" when it said, page 77 of the Transcript, referring to the "Joint Statement":

> "He didn't loan money on this statement. This statement is only important as to whether he had reason to believe this man was bankrupt at the time the statement was received.
>
> "Now, then you get that kind of a statement from a going concern, and nothing else, and no other knowledge of his business, then the question is whether a man wouldn't assume that Martin was a bankrupt."

And again on page 78 of the Transcript, the Court said:

> "Whether he would think the firm was bankrupt or not, insolvent. If a man knew nothing at all of another's business and got that kind of a statement, showing a balance of seven or eight thousand dollars, and it was a going concern and doing business, without any information or indication that it was insolvent or unable to pay its debts, he would naturally suppose it was a solvent concern, wouldn't he?"

That is the natural conclusion to be drawn from the statement; then when Martin told appellee that his real estate was not included as an asset and

that seven or nine thousand dollars of his debts had been paid, how much more natural would be the conclusion that Martin was solvent!

Respectfully submitted,

J. F. SHELTON,
H. T. BAGLEY,
Attorneys for Appellee.

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No. 2578

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

NORTH PACIFIC STEAMSHIP COMPANY, A CORPORATION CLAIMANT OF THE STEAMSHIP "YUCATAN",

Appellant,

vs.

THE STATE OF OREGON, AND MULTNOMAH COUNTY,

Appellees.

APOSTLES

Upon Appeal from the District Court of the United States for the District of Oregon.

GLASS & PRUDHOMME CO., PORTLAND, OREGON

No._____

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In the United States Circuit Court of Appeals for the Ninth Circuit.

THE NORTH PACIFIC STEAMSHIP COMPANY, Claimant of the Steamship "Yucatan,"

Appellant,

vs.

THE STATE OF OREGON, and MULTNOMAH COUNTY,

Appellees.

Names and Addresses of the Attorneys of Record.

SANDERSON REED and C. A. BELL, Wilcox Building, Portland, Oregon, for Appellant.

A. M. CRAWFORD, Salem, Oregon, and J. A. BECKWITH, Fenton Building, Portland, Oregon, for the State of Oregon,

WALTER H. EVANS and GEORGE MOWREY, County Court House, Portland, Oregon, for Multnomah County.

CAPTION.

In the District Court of the United States For the District of Oregon.

THE STEAMSHIP "YUCATAN", HER ENGINES, BOILERS, TACKLE, APPAREL and FURNITURE,
THE STATE OF OREGON,

Libellant.

THE NORTH PACIFIC STEAMSHIP COMPANY,

Claimant,

MULTNOMAH COUNTY,

Cross Respondent.

Be it remembered that on May 25, 1914, there was filed in the District Court of the United States for the District of Oregon, a libel in which the State of Oregon was Libellant against the Steamship "Yucatan", her engines, boilers, tackle, apparel and furniture and on said date said Libellant duly filed a stipulation for costs in the sum of $754.50, with the National Surety Company as surety; thereafter on May 2 , 1914, a warrant of arrest and monition was duly issued out of said court and said Steamship "Yucatan" was duly arrested by the United States Marshal for the District of Oregon; thereafter on May 26, 1914, the North Pacific Steamship Company filed a claim

as the owner of said steamship "Yucatan" and filed a stipulation for costs in the sum of $200.00 with the Southwestern Surety Insurance Company as surety, and also filed a stipulation to abide by and pay the decree in the sum of $1509.00 with said Southwestern Surety Insurance Company as surety, which stipulation was duly approved by the Honorable Robert S. Bean, District Judge; whereupon said Steamship "Yucatan" was released from arrest and delivered to the claimant. On May 28, 1914, upon leave of the Court granted by order entered on said date said libellant filed an amended libel and on June 15, 1914, said claimant filed an answer to said amended libel, which said answer also included a cross libel against the County of Multnomah and prayed for process against said County of Multnomah; thereafter on July 3, 1914, said claimant filed a stipulation for costs upon the cross libel against the said Multnomah County, with M. J. Higley as surety, and a monition was duly issued out of said court citing said Multnomah County to appear and answer said cross libel; thereafter on September 5, 1914, said Multnomah County filed its answer and on October 14, 1914, said claimant, North Pacific Steamship Company filed a replication to the answer of said County of Multnomah; thereafter on October 26, 1914, upon leave of the court first obtained by order entered on said date, said libellant filed an amended libel; thereafter on October 27, 1914, said claimant filed an answer to said amended libel, which answer also included a cross libel against the County of Mult-

nomah; thereafter on October 28, 1914, an answer was filed to said cross libel by said County of Multnomah; thereafter on October 28th and 29th, 1914, said cause was tried by the Court before the Honorable Robert S. Bean, District Judge upon said second amended libel, answer and cross libel and answer of Multnomah County, and upon the evidence taken in open Court; thereafter on December 8, 1914, a decree was entered in said cause in favor of said libellant, State of Oregon, and awarding damages against said Steamship "Yucatan" and against said Southwestern Surety Insurance Company, stipulator upon said stipulation to abide by and pay the decree for the sum of $1056.00 and its costs and dismissing said cross libel against said respondent, Multnomah County and awarding costs to said Multnomah County; thereafter on December 10, 1914, claimant filed in said cause a motion that the court make findings of fact which motion, by order entered December 14, 1914, was denied; thereafter on December 24, 1914, by an order entered on said date, the amount of the supersedeas bond to be given upon appeal in said cause was fixed by the court at $2,000.00; thereafter on December 28, 1914, said claimant filed its notice of appeal, together with a supersedeas bond in the sum of $2250.00 with the Southwestern Surety Insurance Company as surety, together with a notice of the filing of said bond, and on December 29, 1914, said claimant filed herein its assignment of error.

G. H. MARSH,
Clerk.

In the District Court of the United States for the District of Oregon.

July Term 1914

Be it Remembered, That on the 26th day of October, 1914, there was duly filed in the District Court of the United States for the District of Oregon, a Second Amended Libel in words and figures as follows, to wit:

SECOND AMENDED LIBEL

In the District Court of the United States, for the District of Oregon.

Amended Libel.

STATE OF OREGON,

Libellant,

vs.

STEAMSHIP YUCATAN, her engines, boilers, tackle, apparel and furniture,

Respondent.

To the Honorable Robert S. Bean and Charles E. Wolverton, Judges of the above entitled Court:

The amended libel of the State of Oregon, lessee of the U. S. S. Boston against the Steamship Yucatan, her engines, boilers, tackle, apparel and furniture,

and against all persons intervening for their interests in the same, in a cause of collision, civil and maritime, alleges as follows:

I.

That the defendant vessel, the Yucatan, is now within the Port of Portland, Oregon, within the County of Multnomah, and District of Oregon and within the jurisdiction of this Court.

II.

That at all times herein mentioned the libellant was and now is the lessee of, and in the direct charge and control of the U. S. S. Boston, and that by the terms of said lease libellant is bound to keep said vessel in good order and reapir.

III.

That on the third day of March, 1914, about the hour of twelve o'clock, noon, the U. S. S. Boston was lying at her moorings on the East side of the Willamette River between the Broadway Bridge and the O. W. R. & N. Bridge in the Port of Portland, Oregon, and that the State of Oregon was the owner of a certain auto piano then situated on the starboard side of the gun-deck of the U. S. S. Boston; that about the hour of twelve o'clock, noon, on said date, Captain A. C. Paulsen, Master of the said Steamship Yucatan, moved said Steamship Yucatan away from the Globe Milling Company's Dock, which

is situated directly South of the bow of the U. S. S. Boston, that in so moving his vessel, the said Captain A. C. Paulsen carelessly and negligently handled her so that the said Steamship Yucatan collided with the said U. S. S. Boston; that in so moving the said Steamship Yucatan, her master, Captain A. C. Paulsen, was acting contrary to law in that he was not a licensed pilot for said river and did not have a licensed pilot aboard said vessel; that the position in which the said U. S. S. Boston was moored was legally authorized by the United States Engineers, the owners of the adjoining property and the lessee thereof; by reason of said carelessness and negligence and unlawful handling of said vessel and without fault on the part of the U. S. S. Boston, her officers or crew or the State of Oregon, her lessee, the said Steamship Yucatan collided with the said U. S. S. Boston in the Willamette River, in the Port of Portland, about the hour of twelve o'clock, noon, on the third day of March, 1914, and the State of Oregon received injuries to its property as hereinafter set forth; that said collision was wholly due to the fault and negligence and unlawful handling of the said Steamship Yucatan by her Master A. C. Paulsen in the respects herein before indicated

IV.

That in and by the collision aforesaid, the said auto piano, owned by the State of Oregon, of the value of $700.00 was completely destroyed; and the U. S. S. Boston received damage as follows: forward

six inch gun ports smashed in and bent; frame of forward six inch gun port bent; inner skin near said port bent; starboard searchlight rail bent; canopy, stanchions and sockets on steam launch torn off; swinging boom broken in middle; the total damage to the U. S. S. Boston and her apparel and furniture being $356.00; for which sum the State of Oregon has become liable by reason of a contract made for the repair of said damage; that the State of Oregon was put to the expense of $54.50 for reporter's fees in making the record of the hearing held by the Board of Inquiry regarding said collision pursuant to requirement of the Regulations of the United States Navy; that the total damage suffered by libellant by reason of said collision is the sum of $1110.50.

V.

That all and singular the premises are true and within the maritime and admiralty jurisdiction of this Court.

WHEREFORE libellant prays that process in due form of law and according to the practice of this Court may issue against the said Steamship Yucatan, her engines, boilers, tackle, apparel and furniture and that she may be condemned and sold for damages alleged in this libel; that the Court will hear the evidence which libellant will adduce in support of the allegations of its libel and will enter a decree in favor of the libellant for the sum of $1110.50 the above mentioned damages and will order the same

to be paid and satisfied out of the said proceeds of the sale of the said Steamship Yucatan together with interest and with the costs of the libellant and will otherwise right and justice administer in the premises.

A. M. CRAWFORD and
J. A. BECKWITH,
Proctors for Libellant.

State of Oregon,
County of Marion,—ss.

I, Oswald West, being first duly sworn, say that I am the Governor of the State of Oregon, libellant in the within entitled cause, and that the foregoing amended libel is true as I verily believe.

OSWALD WEST

Subscribed and sworn to before me this 15th day of October, 1914.

J. E. ALLISON
|Seal| Notary Public for Oregon.

Due service admitted at Portland, Oregon, 10-16 1914.

REED & BELL
Proctors for S. S. Yucatan.

GEORGE MOWRY
Deputy Dist. Atty. of Proctors for
Multnomah County.

Filed October 26, 1914 G. H. Marsh, Clerk.

And afterwards, to wit, on the 27th day of October, 1914, there was duly filed in said Court, and cause, an Answer of Claimant, and Cross-Libel in words and figures as follows, to wit:

Answer and Cross Libel.

To the Honorable Judges CHARLES E. WOLVERTON and R. S. BEAN, sitting in admiralty:

The answer of the North Pacific Steamship Company, a corporation of California, to serve also by way of cross libel at the suit of this claimant against the libelant and against the County of Multnomah, State of Oregon, in a cause of damage, civil and maritime, alleges as follows:

I.

That the claimant is a corporation organized and existing under the laws of the State of California, and is engaged in inter-state commerce as a common carrier of freight and passengers, owning and operating a number of steamships between San Diego, California, and Portland, Oregon;

II.

That the County of Multnomah is a corporation organized and existing under the laws of the State of Oregon, and that said County of Multnomah is in charge of the bridges in the City of Portland hereinafter mentioned, and has charge of the operation

of the same and of the employes thereof, and appoints and discharges said employes, and said employes are under the direction and control of said County of Multnomah;

III.

That the claimant admits that on the 3rd day of March, 1914, about the hour of twelve o'clock noon, the Steamship Boston was lying on the east side of the Willamette River between the Broadway Bridge and the O. W. R. & N. Bridge, generally known as the Steel Bridge, in the City of Portland, but denies that it has any knowledge or information sufficient to form a belief as to the ownership of the auto-piano named in the libel as belonging to the libelant, and puts the libelant on proof as to the ownership of the same;

IV.

Admits that about the hour of twelve o'clock noon on said date Captain A. C. Poulsen, master of the said Steamship Yucatan, moved said Steamship Yucatan away from the Globe Milling Company Dock which is situated directly south of the bow of the said Boston, but the claimant denies that in so moving his vessel the said Captain Poulsen carelessly or negligently handled her so that she collided with the said Boston, and denies that she collided with the said Boston at all, and denies that the said Captain Poulsen handled said steamship Yucatan carelessly or negligently, and denies that the alleged

collision mentioned in the libel, or any collision, was wholly or at all due to the fault or negligence or unlawful handling of the said Steamship Yucatan by her master, Captain A. C. Poulsen, in any respect, and denies that the position in which the said Boston was moored was regularly authorized by the United States engineers, and denies that the owners of the adjoining property or the lessees thereof have any right to authorize the location of the United States Steamship Boston;

V.

The claimant alleges and shows that the said Boston on the 3rd day of March, 1914, about noon, was lying just north of the said Globe Dock in the fairway of the channel within the City limits of the City of Portland, County of Multnomah, State of Oregon, and that the City of Portland is a municipal corporation organized and existing under the laws of the State of Oregon, and as such has made the following regulations regarding the harbor of the City of Portland:

> "Vessels must not be anchored or moored within the fairway channel within the city limits, neither must they be moored or anchored within four hundred (400) feet of any bridge or ferry line."

That the said Boston at said time was moored in the fairway about parallel with the current of the Willamette River, and at that time there projected from the starboard side of the said Boston several

guns of large size, which guns projected from the starboard side of the said Boston as she lay with her bow to the south some ten or twelve feet; that the said guns were not fast to the said Boston, but were easily moved; and easily movable; and that it is further provided by the regulations of the City of Portland covering the harbor, as follows:

> "Section 6. The master or person having charge or command of any vessel coming to or lying alongside any wharf shall both before and during such time as such vessel is moored or stationed at such wharf, or vessel berthed at a wharf, have the anchors stowed, the jib-boom in, the lower yards topped and braced sharp up, and all other projections stowed within the rail of the said vessel."

That said regulations are an ordinance of the said City of Portland, to-wit: Ordinance No. 17591, entitled AN ORDINANCE DEFINING THE DUTIES OF HARBOR MASTER AND REGULATING THE PORT OF THE CITY OF PORTLAND, AND REPEALING ALL ORDINANCES AND PARTS OF ORDINANCES IN CONFLICT HEREWITH, and was passed by the Council of the said City of Portland on March 11, 1908, and approved by the Mayor of the City of Portland on March 17, 1908.

VI.

The claimant further shows that the said piano was standing close against the butt of said gun and between the butt of said gun and against the metal

covering or skin, as it is known, of the said Steamship Boston, whereby the slightest contact with the muzzle of said heavy gun would cause the said gun to swing on its trunnion or wheels standing on a circular track and cause the destruction of said piano; and that it was negligence and carelessness on the part of the libelant to leave said auto-piano in a position where such damage could occur, and it was negligence and carelessness on the part of the said Boston and the State of Oregon to moor the said Boston as aforesaid contrary to the ordinances of the said City of Portland, and that said ordinance has not been repealed, and the same is in force; and that is negligence on the part of the said Boston and the State of Oregon in so mooring said Boston in the fairway of the channel of the Willamette River as aforesaid; and that the said State of Oregon, the libelant, has possession and charge and control of the said Boston, and all the acts and things heretofore pleaded in regard to the said Boston and the said auto-piano and the said guns were done by the libelant;

VII.

That the claimant has no knowledge or information sufficient to form a belief as to whether or not the libelant by the terms of any lease is bound to keep the Boston in good order or repair, or in any repair.

VIII.

That there are five bridges in the City of Portland, all of which have draws, and all of which open upon

signal, subject to the regulations of the government of the United States and to rules and regulations of the Secretary of War, and the regulations have been issued by the Secretary of War that the said draws shall be promptly opened, and in case the draw cannot be immediately operated when the prescribed signal is given, a red flag or ball by day and a red light by night shall be conspicuously displayed;

IX.

The claimant shows and alleges that on the said 3rd day of March, 1914, about noon, the Steamship Yucatan was lying at the Globe Milling Company Dock aforesaid and wished to leave the same and pass north down stream through the Broadway Bridge hereinbefore referred to, and the said Yucatan signalled for the opening of the draw of the said Broadway Bridge, and got under way preparatory to move down stream, but said draw, however, did not lift or open; the said Ycuatan signalled for the Broadway Bridge again and the said Bridge did not lift or open, and therefore, the master of the Yucatan sounded the danger signal, but the said bridge did not open until nineteen (19) minutes after the signal to open the same had been given, and further displayed no red flag or ball to indicate that the bridge would not open, but immediately upon the said bridge beginning to open the said Yucatan got under way to pass through said bridge, but because the river at that point is approximately only six hundred (600) feet wide, and the distance to the

Broadway Bridge from the said Globe Milling Company Dock is a distance of approximately thirteen hundred (1300) feet, it was unwise for the Yucatan to let go the line made fast to the said Globe Dock while the said bridge was still shut; that said bridge opened nineteen (19) minutes after the signal sounded, for which reason the said Yucatan swung on her line fast to the dock and in getting under way for said bridge, one of said guns projecting as aforesaid from the starboard side of the said Boston scraped against the starboard quarter of the Yucatan as she left the said Globe Milling Company Dock and entered three or more of the port holes or dead lights on the Yucatan at the same time damaging or cracking three (3) plates on the Yucatan, whereby the said gun swung on its trunnion and the said gun struck the auto-piano mentioned in the libel;

X.

The claimant further states and shows that before leaving said dock the cargo boom of the said Yucatan was made fast, but that the muzzle of the said gun scraping the side of the said Yucatan caught on the guy fastened to a bolt on the starboard side of the Yucatan, thereby putting such pressure on said guy as to tear loose the opposite guy amidships, which allowed the said cargo boom to swing and the force exerted by the said gun on the said starboard guy threw said cargo boom into the canopy and stanchions of the steam launch mentioned in the libel for a number of feet, and the claimant alleges and shows that the alleged

damage to the said steam launch was caused by the negligence and carelessness of the libelant in projecting said guns into the fairway aforesaid, and was not the negligence or carelessness of the said Steamship Yucatan, or of her master or officers;

XI.

The claimant further denies any knowledge or information sufficient to form a belief as to the value of the said auto-piano or the damage to the said Boston, and puts the libelant on proof of the same.

XII.

The claimant further shows that it has no knowledge or information sufficient to form a belief as to the cost of any court of inquiry, and alleges that any expense for any board of inquiry is immaterial and in no way connected with any claim that the State of Oregon may have against the said Steamship Yucatan or the claimant.

XIII.

The claimant denies any knowledge or information sufficient to form a belief as to any damage suffered by the libelant, and puts the libelant to proof of the same.

XIV.

The claimant further alleges that the said Steamship Yucatan was in charge of her duly licensed master, Captain A. C. Poulesn, who is and at all the

times herein mentioned was competent and able as master of the said Steamship Yucatan or other ships, and particularly to handle said Steamship Yucatan in the Willamette River at Portland, Oregon and all other places;

XV.

The claimant further alleges and shows that any damage claimed by the libelant was caused by the *l*egligence of the libelant stationing said Boston in the fairway and in projecting the said guns further into the fairway of the channel whereby damage was caused to said piano, and caused the cargo boom to rip the canopy on the said steam launch, and by the negligence of the County of Multnomah, and State of Oregon, in not promptly opening said draw, and in putting in charge of said Broadway Bridge a bridge tender or operator not familiar with the bridges or electricity by which the said bridge was and is operated, and not familiar with the river and the regulations covering the movements of boats and vessels;

XVI.

That the damage to the said Yucatan by reason of the contact with the said gun on the Boston is the sum of twelve hundred dollars ($1200.00), the cost of repairing and replacing plates, and that demand has been made in writing upon the said County of Multnomah, State of Oregon, for the payment to this claimant of the said sum of twelve hundred dollars ($1200.00)

XVII.

That all and singular the premises are true and in the admiralty and maritime jurisdiction of this honorable court.

WHEREFORE, this claimant and cross libelant prays that this honorable court will pronounce against the amended libel and dismiss the same without costs, and that the State of Oregon, and County of Multnomah, State of Oregon, be required to pay to this claimant damages for the injury to the said Yucatan in the sum of twelve hundred dollars ($1200.00), and that the court give to this claimant such other and further relief as in law and justice it may be entitled to receive.

NORTH PACIFIC STEAMSHIP COMPANY,
By SANDERSON REED.
REED & BELL,
Proctors.

State of Oregon,
County of Multnomah,—ss.

I, M. J. Higley, being first duly sworn, depose and say that I am the agent of the North Pacific S. S. Co., claimant in the above entitled action; and that the foregoing Answer and Cross Libel is true as I verily believe.

MARTIN J. HIGLEY

Subscribed and sworn to before me this 27th day of October, A. D. 1914.

ETHEL C. GRAHAM,
[Seal] Notary Public for Oregon.

State of Oregon,
County of Multnomah,—ss.

Due service of the within Answer and Cross-Libel by copy as prescribed by law, is hereby admitted, at Portland, Oregon, this day of October, 1914.

GEORGE MOWREY,
Deputy District Attorney, of Attorneys for Multnomah County.

J. A. BECKWITH,
Attorney for Libellant, State of Oregon.

Filed October 27, 1914. G. H. Marsh, Clerk.

And afterwards, to wit, on the 28th day of October, 1914, there was duly filed in said Court, and cause an Answer to Cross-Libel in words and figures as follows, to wit:

Answer to Cross-Libel.

To the Honorable R. S. BEAN and CHARLES E. WOLVERTON, Judges of the above entitled court sitting in admiralty:

The County of Multnomah, State of Oregon, for answer to the Amended Cross Libel of the North Pacific Steamship Company alleges and propounds as follows:

I

Admits the allegations of the first article of said Amended Cross Libel.

II

Admits the allegations of the second article of said Amended Cross Libel.

III

Admits the allegations of the fifth article of said Amended Cross Libel.

IV

As to the allegations contained in the sixth article of said Amended Cross Libel, this respondent has no knowledge or information sufficient to form a belief as to the truth or falsity of any of said allegations.

V

Answering the eighth article of said Amended Cross Libel, this respondent admits that there are five bridges in the City of Portland all of which have draws and all of which open up on signals, subject to the regulations of the Government of the United States and to rules and regulations of the Secretary of War, that said draws shall be promptly opened, and that in case a draw cannot be immediately operated when the prescribed signal in given, a red flag or ball by day or a red light by night shall be conspicuously displayed, but this respondent further alleges the truth to be that after the proper signals for any one of said bridges have been, it is the duty of the persons operating said bridge to cause the draw to be opened without unreasonable delay with

reference to the state of the traffic at the time, the construction of the draw or lift, and the conditions existing at the time such signal is given.

VI

Answering the ninth article of said Amended Cross Libel this respondent admits that on the 3rd day of March, 1914, about noon, the said Steamship Yucatan was lying at the Globe Milling Company dock mentioned in said amended Cross Libel, and wished to leave the same and pass north down stream through said Broadway bridge, and that the said Yucatan signalled for the opening of the draw of said Broadway bridge and got under way preparatory to move down stream, and that the said draw at the exact time of said signal did not lift or open, and that the said Yucatan signalled for the Broadway bridge again, and that at the exact time of said second signal the said draw did not lift or open, and that thereafter the master of the said Yucatan sounded the danger signal, but this respondent denies that the said bridge did not open until nineteen minutes or more than fourteen minutes after the first signal to open the same had been given, but admits that no red flag or ball was displayed to indicate the said bridge would not open, and this respondent denies that immediately upon said bridge beginning to open or any less than four minutes thereafter the said Yucatan got under way to pass through said bridge, and this respondent admits that the river at said point is approximately only six hundred (600) feet wide and that the dis-

tance to the Broadway bridge from the said Globe Milling Company dock is a distance of approximately thirteen hundred feet (1300), but this respondent denies that it was or would have been unwise for the said Yucatan to let go the line made fast to the said Globe Milling Company dock while the said bridge was still shut, and as to the remaining allegations contained in said ninth article, this respondent has no knowledge or information of any of said allegations sufficient to form a belief as to the truth or falsity of any of said allegations and therefore requires proof of the same, except that this respondent admits that there was at said time a collision between the said Yucatan and the said Steamship Boston, but this respondent denies that said collision was in any manner caused by any failure or delay of the said Broadway bridge to open.

VII

As to the allegations contained in the tenth article of said Amended Cross Libel, this respondent has no knowledge or information sufficient to form a belief of the truth or falsity of any of said allegations.

VIII

Answering the fourteenth article of said Amended Cross Libel, this respondent admits that the said Yucatan at said time was in charge of said Captain A. C. Paulsen, who was at said time her master, but denies that the said A. C. Paulsen was at said time licensed, competent or able to handle the said Yuca-

tan or any other vessel in the Willamette River at Portland, Oregon, or at any other place in said Willamette River.

IX

Answering the fifteenth article of said Amended Cross Libel, this respondent denies that the damage claimed by the Libelant or by the Cross Libelant, or by any one was caused by any negligence of the County of Multnomah, State of Oregon, either in not promptly opening said draw or in putting in charge of said Broadway bridge a bridge tender or operator not familiar with the bridges or electricity by which the said bridge was operated, or not familiar with the river or regulations covering the movements of boats or vessels, and this respondent further denies that said damage or any damage whatsoever was caused by any negligence whatsoever of the said County of Multnomah, State of Oregon, and denies that said draw did not promptly open, and denies that the bridge tender in charge of said Broadway bridge was not familiar with bridges or electricity by which said bridge was operated, or with the river or the regulations covering movements of boats or vessels thereon. This respondent further denies that there was any negligence whatsoever on the part of said Multnomah County or State of Oregon, or that there was any failure whatsoever of said bridge to open promptly.

X

As to the allegations contained in the sixteenth article of said Amended Cross Libel, this respondent has no knowledge or information sufficient to form a belief as to whether the damage to the said Yucatan by reason of the said contact with the said gun on said Boston, or for any other reason or at all, is the sum of Twelve Hundred Dollars ($1200.00) or any other sum, and therefore this respondent requires proof of same, but this respondent admits that a demand has been made in writing upon the said County of Multnomah, State of Oregon, for the payment to said claimant of the said sum of Twelve Hundred Dollars ($1200).

XI

Answering the seventeenth article of said Amended Cross Libel, this respondent denies that all and singular the premises are true except as hereinbefore expressly admitted, but this respondent admits the jurisdiction of this Honorable Court.

XII

Further *further* answering said Amended Cross Libel, this respondent propounds and alleges that at the time the first signal mentioned in said amended cross libel was given, (the same being mentinoned in the 9th article of said amended cross bill) the said steamship "Yucatan" was lying at the said Globe Milling Company dock on the east side of the said Willamette river south, or upstream, from the said Broadway

bridge, and that at the time when said first signal was given, the said "Yucatan" was headed upstream and was fastened to said dock by her stern line, and that at said time of said first signal it was the intention of the Master of said "Yucatan" to turn said "Yucatan" around and to steer her bow-first through said Broadway bridge, but that at the time of said first signal the said "Yucatan" had not yet begun to make said turn; that shortly after said first signal, the said "Yucatan" began to make said turn, and that at the time when the said second signal mentioned in said Amended Cross Libel was given, the said "Yucatan" was making said turn, her stern being fastened to said dock at said time by said stern line, and that at the said time of said second signal, the bow of the said "Yucatan" was only about twenty degrees off said dock; that at said time the traffic over the said bridge, consisting of streetcars, pedestrians and vehicles of all kinds, was extremely heavy, it being the noon hour of the day, and about the time of said first signal the bridge tender in charge of said bridge began to prepare to clear said bridge of said traffic, and at the said time of said second signal was so preparing to clear said bridge of said traffic so as to open said draw; that the current in said river at said time at the place where said "Yucatan" was making said turn was about two knots an hour, and that said "Yucatan" was and is a ship of about 360 feet in length and that in turning around at said place in the manner above described a vessel of that kind, size and character, a careful and skill-

ful pilot and one who was familiar with the speed and set of the current and the depth of the water in said Willamette river in said place at said time, would have caused such vessel to let go of said stern line and to get underway for said draw as soon as the bow of said vessel reached a point about one hundred degrees off said dock; that the said A. C. Paulsen, the said Master of the "Yucatan" was not at said time a licensed pilot for said Willamette river at Portland harbor, and that at said time there was no licensed pilot for said waters aboard said ship, and at said time the said A. *E.* Paulsen was not familiar with the speed or set of the current, the depth of the water or the character of the bottom of the said Willamette river at said place, and at said time and place was carelessly, negligently and unlawfully moving said vessel in said Willamette river and Portland Harbor without being licensed as a pilot for said waters and without having a licensed pilot for said waters aboard said vessel, and without being himself familiar with the said local conditions of said waters; that from the time of said first signal it took said "Yucatan" in making said turn approximately fifteen minutes to reach said point where the bow of said "Yucatan" was one hundred degrees off said dock; that the said Broadway bridge at the time when the bow of said "Yucatan" reached said point of one hundred degrees was already open, would have been, and in fact was, fully open and ready for the said "Yucatan" to go through several minutes before said "Yucatan," if at said point of one hundred degrees she had let

go of said stern line and got underway for said bridge, would have reached said bridge; but that when the said "Yucatan", in making said turn reached said point where the bow of said vessel was about one hundred degrees off said dock, the said A. C. Paulsen carelessly and negligently failed to cause said "Yucatan" to let go of said stern line or to get underway for said draw, but carelessly, negligently and unskillfully caused said "Yucatan" to hang on to said stern line and not to let go of the same or to get underway for said draw until the bow of said "Yucatan" had reached a point one hundred and fifty degrees off said dock, at which point the said "Yucatan" did in fact let go said stern line and make for said draw; and that said A. C. Paulsen at said point found himself unable and incompetent to handle said vessel at said place, and thereupon sounded the danger signal; and that the said A. C. Paulsen at said time was not familiar with the exact location of the said Steamship "Boston" relative to the Globe Milling Company dock, or the Steamship "Yucatan", and not being able or competent, as aforesaid, to handle said "Yucatan" in said Willamette river or Portland harbor, the said A. C. Paulsen did then and there carelessly, negligently and unskillfully handle, direct and steer the said "Yucatan" in such a way that the said "Yucatan" did then and there collide with the said gun on the said "Boston" mentioned in said Amended Cross Libel, and that the said collision herein mentioned was the same collision as is mentioned and described in said Amended Cross Libel;

that immediately after said collision, said "Yucatan" went on through said Broadway bridge, which, at said time, was fully open; that the said collision was caused entirely by the aforesaid negligence, carelessness and unskillfulness of the said A. C. Paulsen, and not otherwise; that the said Broadway bridge on said occasion was open for a period of about seven minutes, and that this respondent was not in any manner careless or negligent in handling or operating said bridge, and did not in any manner or degree cause or bring about said collision; that all and singular these premises are true.

WHEREFORE, this respondent prays that this Honorable Court will pronounce against the demand of said Amended Cross Libelant in said Amended Cross Libel mentioned, with costs.

WALTER H. EVANS,
District Attorney for Multnomah Co. Oregon.

GEORGE MOWREY, ..
Deputy District Attorney for Multnomah County, Oregon.
Proctors for Respondent, Multnomah County, Oregon.

State of Oregon,
County of Multnomah,——ss.

I, Rufus C. Holman, being first duly sworn, upon oath depose and say: That I am a member of the Board of County Commissioners of the within named defendant County of Multnomah, State of Oregon;

that I have read the within and foregoing answer and know the facts therein stated, and that the said answer is true as I verily believe.

RUFUS C. HOLMAN.

Subscribed and sworn to before me this 28th day of October, A. D. 1914.

G. H. MARSH,
Clerk.

State of Oregon,
County of Multnomah,—ss.

Due and legal service of the within Answer is hereby accepted in Multnomah County, Oregon, this 28th day of October, 1914; by receiving a copy thereof, duly certified to as such by Walter H. Evans, District Attorney and Attorney for plaintiff.

REED & BELL,
Proctors for North Pacific Steamship Company.

J. A. BECKWITH,
Proctor for State of Oregon.

Filed October 28, 1914. G. H. Marsh, Clerk.

And afterwards, to wit, on Tuesday, the 8th day of December, 1914, the same being the 32nd Judicial day of the Regular November, 1914, Term of said Court; Present: the Honorable ROBERT S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Decree.

This case having been heard on the pleadings and proofs, and having been argued and submitted by the advocates for the respective parties, and due deliberation having been had, it is now

ORDERED, ADJUDGED and DECREED by the Court, that the libellant, the State of Oregon, recover herein against the Steamship Yucatan, her engines, boilers, tackle, apparel and furniture, and the North Pacific Steamship Company and Southwestern Surety Insurance Company, stipulators, the sum of One Thousand and Fifty-six ($1056.00) Dollars and $132.94, costs and disbursements, and that the said Steamship Yucatan, her engines, boilers, tackle, apparel and furniture be condemned therefor, and it is further

ORDERED, ADJUDGED and DECREED that unless the said stipulators for costs and value on the part of the claimant of said Steamship Yucatan do cause the engagement of their stipulations to be performed within ten (10) days that execution should issue against them to enforce satisfaction of this decree, and it is further

ORDERED that the cross libel filed against Multnomah County be and hereby is dismissed with costs, and is is further

ORDERED and ADJUDGED that said Multnomah County recover herein against the North Pacific Steamship Company and Southwestern Surety

Insurance Company, stipulator, the sum of $139.20, costs as taxed, and it is further

ORDERED that unless this decree be satisfied the said stipulator for costs on the part of the cross libellant, the North Pacific Steamship Company, cause the engagement of its stipulation to be fulfilled within ten (10) days that execution should issue against them to enforce satisfaction of this decree.

Dated this 8th day of December, 1914.

R. S. BEAN,
United States District Judge.

Filed December 8, 1914. G. H. Marsh, Clerk.

And afterwards, to wit, on the 10th day of December, 1914, there was duly filed in said Court, and cause a Motion for Findings, in words and figures as follows, to wit:

Motion for Findings.

Honorable R. S. BEAN, Judge of the above entitled court:

Now comes the claimant, the North Pacific Steamship Company, and moves the court that findings of fact be made by this honorable court on the following points, to-wit:

I.

As to whether or not the Boston was lying in the fairway.

II.

As to the wind and the current on March 3, 1914.

III.

As to whether the guns on the Boston projected from the Boston, and at what distance.

IV.

As to harbor regulations in the City of Portland regarding projections from ships.

V.

As to United States regulations as to the opening of draws on bridges in the City of Portland.

VI.

As to whether or not the draw or lift on the Broadway Bridge opened pursuant to regulations or opened at all.

VII.

As to the time taken by the Broadway Bridge in the matter of opening or lifting.

VIII.

As to whether or not any signal was given from

the Broadway Bridge that the draw would not open on signal as prescribed by regulations.

IX.

As to how the damage to the launch on the Boston was caused.

X.

As to whether the Yucatan went full speed ahead or astern from the Globe Dock.

XI.

As to whether or not the draw was up or begun to be lifted when the Yucatan put on full speed.

XII.

As to the damage done to the Steamship Yucatan by the gun on the Boston.

XIII.

As to the experience of the captain of the Yucatan in the Portland harbor, and as to the issuance of a local pilot's license to the captain of the Yucatan.

XIV.

As to the width of the river at the Globe Milling Company Dock, and as to the distance from the Globe Dock to the Broadway Bridge.

SANDERSON REED and
C. A. BELL
Proctors for claimant, North Pacific Steamship Company.

State of Oregon,
County of Multnomah,—ss.

Due service of the foregoing Motion by copy as prescribed by law, is hereby admitted, at Portland, Oregon, this 10th day of December, 1914.

J. A. BECKWITH,
Attorney for Libelant.

WALTER H. EVANS,
District Attorney for County of Multnomah.
By T. M. DUFFY, Deputy.

U. S. District Court Filed Dec. 10, 1914,

G. H. Marsh, Clerk District of Oregon.

And afterwards, to wit, on Monday, the 14th day of December 1914, the same being the 37th Judicial day of the Regular November, 1914, Term of said Court; Present: the Honorable ROBERT S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Now, at this day, come the libellant by Mr. John A. Beckwith, of proctors and the intervening libellant by Mr. Walter H. Evans, of proctors, and the claimant by Mr. C. A. Bell, of proctors; whereupon, this cause comes on to be heard upon the motion of the claimant that the Court file herein findings of fact; on consideration whereof, IT IS ORDERED AND ADJUDGED that said motion be and the same is hereby denied.

And afterwards, to wit, on the 28th day of December, 1914, there was duly filed in said Court, and cause a Notice of Appeal, in words and figures as follows, to wit:

Notice of Appeal.

To the State of Oregon, and John A. Beckwith, proctor for the said State of Oregon:

To the County of Multnomah, and to the District Attorney of Multnomah County, State of Oregon, proctor for the said County of Multnomah:

You and each of you will please take notice that the North Pacific Steamship Company, claimant in the above entitled suit, hereby appeals to the circuit court of appeals for the ninth circuit from the decree entered in the above entitled suit on the eighth (8th) day of December, 1914, whereby it is ordered and decreed that the State of Oregon recover against the Steamship Yucatan, her engines, boilers, tackle, apparel and furniture, and the North Pacific Steamship Company, and the Southwestern Surety Insurance Company, stipulators, the sum of ten hundred and fifty six dollars ($1056.00) and one hundred thirty two and 94-100 dollars ($132.94), costs and disbursements, and that the said Steamship Yucatan, her engines, boilers, tackle, apparel and furniture be condemned therefor, and wherein it is further ordered and adjudged that the said County of Multnomah recover against the North Pacific Steamship Company and the Southwestern Surety Insurance Com-

pany the sum of one hundred thirty nine and 20-100 dollars ($139.20), costs as taxed, and from all of said decree.

SANDERSON REED and
C. A. BELL,
Proctors for the Claimant.

State of Oregon,
County of Multnomah,—ss.

Due service of the foregoing Notice of Appeal by copy as prescribed by law, is hereby admitted, at Portland, Oregon, this 24th day of December, 1914.

J. A. BECKWITH,
Attorney for State of Oregon.

WALTER H. EVANS,
Attorney for County of Multnomah.

By GEORGE MOWRY,
Deputy.

Filed December 28, 1914. G. H. Marsh, Clerk.

And afterwards, to wit, on the 29th day of December, 1914, there was duly filed in said Court, and cause an Assignment of Errors, in words and figures as follows, to wit:

Assignment of Errors.

The claimant, North Pacific Steamship Company, presents the following assignments of error:

I.

Error of the court in finding that there was negnigence on the part of the master of the Yucatan in the matter of handling the Yucatan on leaving the Globe Dock.

II.

Error of the court in finding that the absence of a harbor pilot was negligence on the part of the master of the Yucatan.

III.

Error of the court in finding that the operators of the Broadway Bridge on the part of Multnomah County were not careless or negligent.

IV.

Error of the court in failing to find that the action of the operators of the Broadway Bridge contributed to the accident.

V.

Error of the court in not finding as to the position of the Boston in the fairway.

VI.

Error of the court in not finding that the projection of the guns from the Boston were against the local ordinances and regulations of the harbor.

VII.

Error of the court in not finding that it was error on the part of the Boston to lie in the fairway with the guns projecting the number of feet shown in the testimony.

VIII.

Error of the court in not finding as to the harbor regulations of the City of Portland, and the United States regulations as to the opening of draws on bridges in the City of Portland.

IX.

Error of the court in not finding the facts as to how the damage to the launch on the Boston was caused.

X.

Error of the court in not finding as to the damage to the Yucatan.

XI.

Error of the court in not finding as to whether or not the draw was up or had begun to be lifted when the Yucatan put on full speed.

XII.

Error of the court in rendering and entering a decree in favor of the libelant and against the Yucatan and the claimant.

(Testimony of H. H. Hilton)

XIII.

Error of the court in not rendering and entering a decree in favor of the claimant and against the libelant and the County of Multnomah for the amount claimed and proven by the claimant, or at least dividing the damages.

REED & BELL,
Proctors for Claimant.

Filed December 29, 1914. G. H. Marsh, Clerk.

And afterwards, to wit, on the 7th day of December, 1914, there was duly filed in said Court, and cause, the Evidence, in words and figures as follows, to wit:

Evidence.

Portland, Oregon, Wednesday, October 28, 1914.

H. H. HILTON

A witness called on behalf of the Libellant, being first duly sworn, testified as follows.

DIRECT EXAMINATION.

Questions by Mr. BECKWITH:

Mr. Hilton, during the period of time from November, 1913, until after this collision happened, what was your occupation?

(Testimony of H. H. Hilton)

A. Clerk of the Naval Board, and assistant in the office of the Asjutant-General of the State of Oregon.

Q. What commision did you hold in the Oregon Naval Militia? A. Ensign.

Q. What commision have you held in the United States Navy? A. Midshipman.

Q. Did you have anything to do with making arrangements regarding the mooring of the Boston, at the position she was in at the time this collision occurred?

A. Yes, sir; I acted under the orders of the Naval Board, and acted as the represenative of the Naval Board in moving the Boston.

Q. Did you take this matter up with the United States Engineer's Office.

A. Yes, sir; through—both through the—after obtaining plats and information, I forwarded for permission, through this local office, to the office in Washington.

Q. From where did you receive the blue prints, the plats that you furnished them?

A. From the office in the Worcester Building, of the Port of Portland.

Q. Wasn't it the Municipal Dock Commision in there? A. Yes, sir.

Q. Now, state to the Court what this is.

A. This is the correspondence relative to the permission granted for the Boston to drive one dolphin inside of the harbor line.

(Testimony of H. H. Hilton)

COURT: What do you mean, inside of the harbor line? A. In the fairway.

COURT: Between the harbor line and the shore?

A. No, sir; out in the fairway.

Q. Towards the center of the stream.

A. Towards the center of the stream, from the harbor line. Then it shows also the other dolphin which was to be driven outside the harbor line; that is, between the harbor line and the shore line, and this—at the time it was understood that the Boston was to moor there—and this is the permission as I filed it for the Naval Board.

Q. That blue print was attached to it at the time?

A. Yes; it was made in quadruplicate, and this was one of the copies.

Q. Was this matter taken up with the harbormaster?

A. The harbormaster took us down there numerous times, different members of the Naval Board and myself, and other people that had charge of moving the Boston, and helped select this site, saying that he thought – – –

Mr. REED: I object to what he said he thought.

Q. Never mind. When was the vessel moved to her moorings where she was on March 3rd? Say month, it will be sufficient.

A. I believe it was in November.

Q. Of what year? A. 1913.

Q. Were you ever in the office of the Army Engineers relative to this—driving this pile?

(Testimony of H. H. Hilton)

A. We did—all of our permission was gotten through correspondence.

Mr. REED: I will point out to your Honor and object to this on the ground that it doesn't say a word about the Boston.

Mr. BECKWITH: We are merely offering to show he had permission to drive piling.

Mr. REED: It shows they can put a dolphin there, but not a word about a right to put her or where she should be put; only a dolphin. If they should depend on that for their case, the boat might project westward to the – – –

Mr. BECKWITH: I offer it in evidence.

Correspondence marked "Libellant's Exhibit A."

COURT: Consider it read, and proceed.

Mr. BECKWITH: With this blueprint that went into evidence, I offer an enlargement of that blue print. This is a scale at 50 feet to one inch.

Mr. REED: May I ask some questions about it?

COURT: Yes.

Questions by Mr. REED:

Q. Mr. Hilton, is that blue print along the lines that you testified about at the investigation on the Boston? You testified then, I believe, did you not, she was nine feet east of the harbor line, and the breadth of her beam inside of the channel?

A. I did not testify where that dolphin was at all.

Q. Not the dolphin. I mean the Boston, in answer to a question by Mr. Reed at that hearing. The question was asked; "Now, the dolphin that

(Testimony of H. H. Hilton)

is aft here, this boat lies on the river side of that dolphin, doesn't it? A. Yes, sir. Q. And that is nine feet within or towards the center of the channel from the harbor line? A. Yes, sir. Q. So that you have got that nine feet and in addition the breadth of the ship outside of the harbor line? A. Astern? Q. Astern, yes. A. Well, that is before this dolphin carried away. Q. Yes, well, how was it March 3rd? A. Well, the dolphin had carried away—let's see – – – Q. I know, but the relative positions? A. Astern, it was; yes, it was just about that. Q. Yes, sir. So she was really nine feet and in addition to that, the width of the boat, whatever that may be, depending on how her bow lay, toward the center from the harbor line? A. Yes, sir. The intention was that we should pull in when the water rose enough to allow us to go further on the beach. Q. Why? A. Because we would have more depth of water." Is that what you swore to?

A. Yes, sir.

Q. Then, is that blue print that counsel offered, showing that she was nine feet inside the harbor line, as you indicate. Mark it there before it is introduced in evidence, please.

Mr. BECKWITH: The blue print itself shows it.

Mr. REED: No, this one; that one is already in. Just mark the distance.

COURT: Show where the Boston lay.

Mr. BCEKWITH: That is what I will bring out. That is what I am offering the blue print for.

(Testimony of H. H. Hilton)

Mr. REED: He says nine feet inside the harbor line, and then her breadth and the gun projecting besides.

Examination continued by Mr. BECKWITH.

Q. Now, this enlargement here. Can you see this? A. Fairly well.

Q. Show where this Globe Milling dock is on this blue print. (Larger blueprint).

A. The furthest corner – – –

Mr. REED: If the Court will pardon me, is this in evidence? And before it is offered, I would like to have it completed, showing – – –

COURT: You can mark that later. I understand this is simply an enlargement of the other plat, and doesn't show the location of the Boston at all.

Mr. REED: Beg pardon.

Q. I will show this now by questions. Where is the Globe Milling dock on this?

A. (Indicating) This is the corner of the Globe Milling dock. The downstream corner.

Q. The sand dock which was used by the Boston?

A. (Indicating) This is the sand dock just astern of the Boston.

COURT: How is it marked there on the map?

A. Sand and gravel dock.

Q. Where was this dolphin driven? The after dolphin?

A. The after dolphin was driven approximately 90 feet from the south corner – – –

Q. Which way?

(Testimony of H. H. Hilton)

A. (Continuing) Of the sand and gravel dock upstream, and from that line it was practically nine feet out at that point from the harbor line.

COURT: Nine feet into the channel?

A. Nine feet into the channel, but that wasn't—that wasn't in that position when this collision occurred.

Q. Now, where was the other dolphin you spoke of?

A. The other dolphin was in a line between the north corner of the sand and gravel dock, and a point determining the harbor line on the Globe Milling Dock 194 feet from the after dolphin, the dolphin that was driven in the fairway.

Q. Then they were 194 feet apart?

A. Yes, sir.

Q. At the time this accident happened, which dolphin was there?

A. The forward dolphin; the one that was not in the fairway was the only one still remaining.

COURT: You say the forward. The forward dolphin was in the harbor line, wasn't it, inside the harbor line? A. Yes, sir.

COURT: Well, you mean was outside the harbor line. A. Yes, sir.

Q. As a matter of fact, was it not just about on the line? A. Yes.

Q. Show where this sewer comes out on the east side, this Irvington sewer comes down through there. How far is that from this forward dolphin?

A. This big sewer, concrete sewer, comes out directly inshore from this forward dolphin, about—

(Testimony of H. H. Hilton)

just about nine feet from the inner side of the dolphin.

Q. Tell the Court the length and beam of the dolphin.

A. The length of the Boston is 277 1-2 feet long.

COURT: Over all?

A. Over all; from stem to stern.

Q. What is the beam?

A. Its biggest beam, its largest beam is 42.2 feet.

Q. Now, what is the length of the forecastle of the Boston, from the house to the peak?

A. The length of the forecastle of the Boston is 63 feet, from the outside—from the peak of the superstructure to the bow, and at that same point, it is 37 feet broad.

Q. What is the distance from the dolphin the forward dolphin, to the nearest corner of the Globe Milling dock?

A. From the bow to the nearest corner is 111 feet.

Q. The bow of the Boston as it now stands?

A. Yes, as it now stands is 111 feet.

Mr. REED: From where, please?

A. From the nearest corner of the Globe Milling dock to the bow of the Boston.

COURT: He asked about piling.

Q. Figure out the distance from that.

A. That dolphin, as I measured it, was - - -

Mr. REED— Is now.

COURT: Yes, now.

A. (Continuing) Was 28 feet from the bow; that makes it 138 feet that the dolphin was from

(Testimony of H. H. Hilton)

the nearest corner of the Globe Milling dock now.

Q. It is in the same place it was in the first place.

A. Yes.

Q. Then it is 139 feet from the nearest corner of the Globe Milling dock to the forward dolphin?

A. Yes, sir.

Q. And 194 feet from the forward dolphin to the place where the after dolphin was?

A. Yes, sir.

Q. Have you ever taken soundings in there?

A. Yes, sir; with the aid of the harbormaster at various times in small boats, we have sounded everywhere from below the sand and gravel dock up to the Globe Milling dock.

Q. What is the nature of the bottom there?

A. The bank is generally of what they call cement gravel, almost approaching a hard pan or rock.

Q. What is the nature of the bank along here?

A. The Railroad Company, besides this gravel foundation, have put in retainers or big stone blocks, and large rocks to keep their fairway— their road bed from sliding.

Q. Where was the Boston—now, this six inch gun, the forward six inch gun on the starboard side of the Boston—are you familiar with the location of that gun? A. Yes, sir.

Q. How far does that gun extend outside the side of the vessel?

A. From where the shutters were I measured it

(Testimony of H. H. Hilton)

about eight feet and eight inches, from where the shutters were to the muzzle of the gun.

Q. There is a six pounder gun sponson just forward of this gun, is there not? A. Yes, sir.

Q. Tell the court the nature of that gun sponson, what it is?

A. It is a platform built up a few feet from the gun deck, where a small carriage is put, for mounting a six pounder, rapid fire gun. It projects out through the shutters that are in this sponson.

Q. What is the nature of the sponson—square or round?

A. It is semi-circular. It is just a semi-circle,extending out over the ship's side.

Q. What is the diameter of this sponson on the Boston?

A. I have never measured it.

Q. Have you measured how far this sponson extends along from the side of the vessel?

A. Yes, I have estimated it, as near as possible; practically extends—projects out over the side of the ship two feet and eight inches.

Q. And what is the top of this sponson used for?

A. For the heaving the lead, that is the chains.

Q. Isn't there a search light up there?

A. No, sir; a searchlight platform; no searchlight.

Q. Isn't there a little platform outside this sponson that they call the chains? A. Yes.

Q. What is the width of that?

(Testimony of H. H. Hilton)

A. That is one foot.

Q. That would make a total of three feet eight inches?

A. Yes, sir.

Q. And the gun, the six inch gun, is aft of the sponson? A. Yes.

Q. About how far is that six inch gun aft the sponson?

A. About five or six feet, I should say.

Q. The six inch gun is not in the sponson?

A. No, sir.

Q. Then that would make the six inch gun extend about five feet beyond the extreme side of the Boston? A. Yes, sir.

Q. There is more than one sponson on the vessel?

A. Yes, sir.

Q. Just show the Court on this little diagram, how the sponsons are located.

A. There are four in all of them. One right on the starboard bow, that was hit; directly on the other side there is the mate to it; then astern on the—where the superstructure deck terminates on either side, there is two—there is another similar sponson, making four sponsons in all.

Q. Those sponsons are composed of iron, are they, the same as the vessel? A. Yes, sir.

Q. Do you know where the Boston, what part of the Boston, now, touches the forward dolphin?

A. Yes, sir, it is now resting just about in the

(Testimony of H. H. Hilton)

center of the billboard. That is where the anchor is kept.

Q. That is the forward anchor?

A. The forward anchor on the port side.

Q. How far is that—are you familiar with the place where the Boston touched the sponson at the time this accident happened March 3rd?

A. Yes, sir; at that time it was leaning up against a boat boom, which was alongside the boat about at a point where the superstructure deck terminates, and where the sheet anchor is kept in its billboard.

Q. What is the distance between these two points?

A. 40 feet.

Q. Was the Boston's position shifted after the 3rd of March? A. Yes, sir.

Q. What position was it shifted to? Which way?

A. Shifted down the stream from the after—from where the sheet anchor stay is, to where the regular anchor is.

Q. That is, she was dropped astern 40 feet?

A. Yes, sir.

Q. Now, figure out the position of the bow of the Boston to show the Court how far the bow of the Boston on the 3rd of March was from the nearest corner of the Globe Milling Company dock.

A. Well, the bow now is 111 feet from the nearest corner of the Globe Milling dock, and it was moved astern 40 feet, therefore, it would be some 71 feet from the nearest corner of the Globe Milling dock at the time of this accident.

(Testimony of H. H. Hilton)

CROSS EXAMINATION.

Questions by Mr. Reed:

Mr. Hilton, do you remember when Mr. Gavin said she was dropped 75 feet down, at the investigation on the Boston?

A. I wasn't present.

Q. Weren't you? A. No, sir.

Q. Is your name H. H. Hilton?

A. Yes, sir.

Q. Well, you were present at the examination, weren't you?

A. I was there during my own testimony.

Q. Oh, you didn't hear Mr. Gavin?

A. Not that I remember of, no, sir.

Q. So if he said they dropped 75 feet down, that was a mistake, was it?

A. According to my estimates now, it might be.

Q. Do you remember the date she was dropped down? A. No, sir.

Q. Well, I will ask you whether or not it is on the 8th day of April? A. I couldn't say.

Q. Well, state when it was, as near as you can.

A. Well, it was along in April some time is all I know.

Q. It was shortly after this accident of the 3rd of March? A. Yes, sir.

Q. Was it at the order of the Harbormaster, Speirs? A. I have no idea.

Q. Were you on the boat at the time?

(Testimony of H. H. Hilton)

A. No, sir.

Q. Where is Mr. Gavin now?

A. He is in the courtroom, sir.

Q. I don't understand about the sponsons. Isn't the breach of that six inch gun enclosed in the semi-circular cage or turret, or something?

A. No, sir.

Q. Does it project right out of the flat side of the ship? A. Yes, sir.

Q. Just through a port hole or shutters. There is nothing round there at all?

A. Only the carriage it rests on.

Q. What? A. Only the carriage it rests on.

Q. I know, but is that carriage in anything that is made for it, or is it up against the straight line of the ship—the side?

A. Oh, it is just stationary to the deck inside the shutters.

Q. I know, but is the deck where the gun projects a straight line, or has it a bulge, or curve on it?

A. No, sir, the side of the ship is in a perfectly straight line.

Q. That is what I wanted to get at. And that semi-circular thing I thought the gun went through, is about five feet forward of the gun?

A. That is the six pounder sponson you are talking about.

Q. No sponson for the six inch gun.

A. No sponson for the six inch gun.

Q. So that she projects then, that gun does, about

(Testimony of H. H. Hilton)

five feet or something or other, beyond the six pounder sponson? A. Yes, sir.

Q. And you say the beam is 42 feet? Does the beam include the sponson? That is the widest part of the beam, isn't it? A. Yes, sir.

Q. That isn't where the sponson is situated?

A. That is according to the specifications of the boat, when she was built.

Q. Does that include the guns as they project out?

A. No, sir, I didn't say so.

Q. I know that; but I was getting at that. Do the guns project in addition to the beam?

A. Yes, sir.

Q. Was the steam launch within the rail, or outside?

A. It was in its cradle on the whaleback of the boat.

Q. Is it within or without the rail?

A. The railing; there is no railing.

Q. I know, but the sides of the boat then.

A. It is within the side of the boat.

Q. It is within; that is clearly and entirely within?

A. Yes, sir.

REDIRECT EXAMINATION.

Questions by Mr. BECKWITH:

Did you take any photographs or pictures of the after dolphin, and the position of the Boston when she was first placed there in November?

(Testimony of H. H. Hilton)

A. Yes, sir, I took a series of six pictures for reference by the Naval Board.

Q. Are these the pictures you took at that time?

A. These are two of the pictures, yes.

Q. That is in November? A. Yes, sir.

Q. Do these show the position and situation of the Boston with reference to the sand dock?

A. Yes, sir.

Mr. BECKWITH: I offer these in evidence.

Mr. REED: Was this for March 3rd?

Mr. BECKWITH: Merely to show her position in November, I will show by Gavin later that the position was about the same.

Mr. REED: Is this for the position she was in March 3rd, the time of that accident?

Mr. BECKWITH: No, showing it in November. I will use these pictures to show the position was near the same as March 3rd. This is for the purpose of showing the position of the after dolphin and the barge.

Mr. REED: That sets me right, and I don't object to that. March 3rd is the time we are interested in.

COURT: You don't claim the boat was in the same position as these pictures at the time of the accident?

Mr. BECKWITH: No; showing the position of

(Testimony of A. B. McAlpin)

the after dolphin which fell down, and the barge which was in the port gangway there; the gangway from the sand dock.

Pictures marked "Libellant's Exhibits B and C."

Witness excused.

Mr. REED: Mr. McAlpin is here, and is in a great hurry; I would like to place him on out of order.

Mr. BECKWITH: I have no objection.

A. B. McALPIN

A witness called on behalf of the claimant, being first duly sworn, testified as follows.

DIRECT EXAMINATION

Questions by Mr. REED:

Please state your residence and occupation?

A. Portland. I am a photographer.

Q. I will show you four photographs, and ask you if you can recognize them?

A. Yes, sir; those are four photographs taken by me on the 17th of March last.

Q. Were they taken by you personally?

A. Yes, sir.

Q. Are they true representations of the subject that the camera was aimed at? A. Yes, sir.

A. And you know what the steamer lying at the dock is at that time?

A. The steamer Yucatan, and the Boston lying below in the stream.

(Testimony of Harvey Beckwith)

Mr. REED: We offer them in evidence.

COURT: Taken after the accident?

Mr. REED: The 17th of March?

COURT: After the collision?

Mr. REED: Yes, the 17th of March.

Mr. BECKWITH: But before the Boston was moved?

A. Before the Boston was moved. The same boats and the same locality exactly.

Mr. BECKWITH: No objection.

Marked "Claimant's Exhibits 1, 2, 3, and 4".

Witness excused.

HARVEY BECKWITH

A witness called on behalf of the Libellant, being first duly sworn, testified as follows.

DIRECT EXAMINATION

Questions by Mr. BECKWITH:

Mr. Beckwith, what position did you hold in the Oregon Naval Militia, from November 1, 1913, up to after March 3, 1914?

A. I was on the Naval Board.

Q. Were you chairman of the Board?

A. Chairman of the Board.

Q. State what you did, what arrangements you made, etc., relative to moving the Boston to her moorings near this sand dock.

A. I cannot give you the exact dates, but the Board considered the moving of the boat to a point that

(Testimony of Harvey Beckwith)

would be more advantageous to the militia, advantageous to the members, that had to visit the boat, from where she was than lying at the foot of Jefferson Street. The Board took the matter up with Drake O'Reilly, who owns the sand dock, and got his permission to anchor off the sand dock. The Board then went to the Harbor Commision, I think it is, in the Worcester Building, and got a drawing of the harbor line.

Q. Was it the Harbor Commision, or the Municipal Dock Commision?

A. I guess the Municipal Dock Commision, on the second floor of the Worcester Building. We then went to Major McIndoe, I believe that is his name, of the United States Engineers, and received his permission to drive a dolphin outside the harbor line; that is, towards the center of the river. We received permission to drive it, if necessary, nine feet outside. It was found that that was not absolutely necessary, and I think the dolphin is six feet from the line. The permission however, reads nine, but it was found it wasn't necessary to go that far out. The upper dolphin was driven just below the foot of Holladay Avenue, but on the harbor.

Q. Did you ever take this up with the harbormaster?

A. I was going to tell that. The harbormaster, Mr. Speirs, Mr. Larson and myself, I think Mr. Gavin was also present, visited this point before the vessel was moved and surveyed it; that is, merely

(Testimony of Harvey Beckwith)

looked over the situation, and whether it would be the proper place to locate the Boston. Afterwards contracts were made, and the dolphins were driven, and the Boston was moved by The Port of Portland—I think it was The Port of Portland, and anchored at her present mooring.

Q. Was any complaint ever made to the Naval Board regarding the position of the Boston?

A. No, not to my knowledge.

Q. Tell the Court what the Boston is used for by the State of Oregon, and the purpose of the Naval Militia, in a few words.

A. The Boston is loaned to the State of Oregon for the benefit of the Naval Militia, or the Naval Reserve. The vessel is in charge of six—I believe there is more now, but at that time, there was six United States Navalmen. There is also a local organization made up of some ex-United States navy officers, and men as volunteers, and it is used as their floating armory, and the training of these men in the various duties that are taught aboard naval vessels.

Q. Well, is it necessary to have the vessel in a position near the center of the city?

A. Yes. That is one reason that it was moved from Jefferson Street. It was too far out, and unhandy for these volunteers, who are all young men working in the city, and the idea was to get it as near the center of the city as possible. I want to correct one statement. The vessel was first moved from Jefferson Street to the foot of Stark Street on

(Testimony of Harvey Beckwith)

the east side, in order to be near the center of the city, but they had to move from there on account of the municipal dock buying the adjacent property, so they moved it down to the sand dock; and the reason we chose the present point was that the men could go aboard without crossing the railroad track by going across the sand dock.

CROSS EXAMINATION

Questions by Mr. REED:

Mr. Beckwith, did I hear you say that no complaint had been made about the location of the Boston? A. Yes, sir.

Q. Well, do you know whether any complaint has been made that you didn't hear of?

A. How is that?

Q. Were all complaints made to yourself?

A. If they were in writing or in any manner brought before the Board, I would hear of them.

Q. You mean to say the Board; you are speaking of the Board; complaints could have been made to the City authorities, and Government engineers couldn't they, without your knowing it?

A. Oh yes.

Q. What? A. Yes.

Q. I didn't hear.

A. Yes; I am not speaking for them.

Q. Might have been a hundred complaints you didn't know anything about all the time?

(Testimony of Harvey Beckwith)

A. Yes, I am speaking for the board.

Q. Beg pardon?

A. I am speaking for the Board; not for any one else.

Q. Do you know who Captain Hall is?

A. No, sir.

Q. Now, you say the Boston was moved so as to get in the center of town, and she really is in the center, isn't she? Isn't she in the narrowest part of the river? How wide is the river there?

A. I haven't any idea.

Q. Are you on the Naval Board?

A. Not now, no, sir.

Q. You were then? A. Yes, sir.

Q. Don't you know where you were putting the boat and her relative position with regard to the width of the river and the current? Didn't you pay any attention to that?

A. There was ample room. We didn't pay attention to it, because there was plenty of room for half a dozen.

Q. No attention paid to it? The attention given by the Board was so as to enable the boys to get across to the boat without crossing the railroad track?

A. That was one of the ideas, yes.

Q. And the other was to give them an easy access to the boat?

A. As easy as possible. I might say, Mr. Reed, that the matter of placing the Boston was also con-

(Testimony of Harvey Beckwith)

sidered as to her position between the two draws. That was also considered.

Q. Were you on the Board when she was moved on about the 1st of April? A. Yes, sir.

Q. What did you move her for? What was she moved for?

A. You mean from Stark Street down there?

Q. No, the first of April, this year?

A. No, no, no.

Q. You were on the Board then, weren't you?

A. No.

Q. Well, Mr. Beckwith asked you if you were on the Board from November 14th to April of this year, I thought. I maybe mistaken; I am a little deaf.

A. Well, I don't—I can't tell you off-hand when I resigned from the Board.

Q. I would like to know, Mr. Beckwith; just tell us when you got off the Board?

A. I don't know; I don't remember.

Q. About when was it?

A. I haven't any idea.

Q. Have you ever made a living on the water?

A. No, sir.

Q. Have you ever been connected with the water? Have you ever been at sea? A. A little.

Q. How much? A. Oh, a few trips.

Q. Have you ever had any experience in handling boats in the harbor? A. No, sir.

Q. And your connection with naval or sea mat-

(Testimony of E. J. Gavin)

ters, is it limited to your experience on the Naval Board? A. Yes, sir.

Witness excused.

E. J. GAVIN

A witness called on behalf of the Libellant, being first duly sworn, testified as follows.

DIRECT EXAMINATION

Questions by Mr. BECKWITH:

Mr. Gavin, what is your rating in the United States Navy? A. Chief Gunner's mate.

Q. How long have you been in the United States Navy? A. 23 years.

Q. Were you assigned to, and on duty aboard the Boston from November, 1913, until after March 3, 1914? A. I was, sir.

Q. What did you do relative to measuring out the mooring position of the Boston prior to the time she was moved to this mooring?

A. Well, I sent men down there to take soundings, to find out the depth of the water in the place selected by the Naval Board.

Q. Were you down there at any time with the harbormaster?

A. Yes, the harbormaster went—we went down in his boat.

Q. Was the Naval Board with you?

A. The Naval Board was with us.

Q. Were any soundings taken at that time?

(Testimony of E. J. Gavin)

A. No, not at that time.

Q. You had the soundings prior to that?

A. Yes.

Q. Now, what part of the Boston is the widest part? A. Center line midships.

Q. At the time this accident happened, you were aboard the ship, were you not? A. I was.

Q. About what time of day did it happen?

A. About 12 o'clock, noon.

Q. Is the 3rd of March the correct date?

A. I couldn't say as to that. I have forgotten.

Q. Do you know whether it was during the month of March?

A. Yes, it was during the month.

Q. State the position of the bow of the Boston with reference to the nearest point of the Globe Milling dock, as near as you can estimate.

A. Well, from my memory, I should say it was about 70 feet.

Q. And the Boston was down the stream, then, 70 feet. Her bow was 70 feet down the stream from the nearest point of the Globe Milling dock?

A. Yes, sir.

Q. And what was the position of the stern, and the quarter deck of the Boston. Possibly you can use this blue print. This is the Globe Milling dock. This is the harbor line.

A. Well, that is about the way she lay, as far as I remember. (Indicating).

Q. This piling, now, was the after piling—Mr.

(Testimony of E. J. Gavin)

Hilton placed the after piling in there. How far is that after piling inside the harbor line?

A. About six feet, I think, we drove it.

Q. And how far towards the center of the stream – –

COURT: Was that piling there at the time of this accident? A. No, sir.

Q. The piling had fallen down prior to this accident?

A. Yes, sir.

Q. Now, where was the port gangway of the Boston? What part of her?

A. The port gangway is about just forward of the after quarter.

Q. Just forward of the after quarter. About in here?

A. Just dividing the ship into four parts.

Q. How far towards the center of the stream was the port side, the port quarter of the Boston from the harbor line, when the accident happened?

A. Port side of the Boston?

Q. That is inboard?

A. About 60 feet.

COURT: How far?

A. About 60 feet.

COURT: From the harbor line?

A. Yes.

COURT: You mean the boat was swinging out in the stream 60 feet.

Q. The harbor takes a turn here. It is an angle.

COURT: I understand that dotted line is the harbor line.

(Testimony of E. J. Gavin)

Mr. REED: That is what I want.

COURT: I understand the stern of the Boston was swinging out 60 feet in the channel at the time.

A. As to the channel, I wouldn't say, your Honor.

COURT: As to the harbor line.

A. Yes sir, this way here; in here. There was so little water, that we had to get out this far, in order to get 18 feet water.

COURT: From this line here to the port quarter of the Boston was about 60 feet. That is, it lay across the channel. A. No, sir.

Q. What was between the port gangway and the harbor line to keep the Boston off?

A. We had a float 20 feet wide

Q. 20 feet wide? A. For the gangway, yes.

Q. For the gangway. How close was that float?

A. The shore end of the float?

Q. How close was that to the harbor line? As a matter of fact, didn't it almost touch the harbor line?

A. At that distance, it almost touched it, yes, sir, this quarter, this end of the quarter here (indicating).

Q. This float was 20 feet wide, and did the other end of the float touch the port end of the Boston?

A. Yes, sir—no, it was two feet out.

Q. Two feet out? A. Yes, sir.

Q. What was the width of the port gangway?

A. About four feet, sir.

Q. So 26 feet of the port gangway would be out.

(Testimony of E. J. Gavin)

A. Yes, sir.

Q. Then the extreme stern of the Boston, say, would be 60 feet—where was the bow?

A. The bow was up against the dolphin. The bow would be even with the outermost piling of the Globe Milling dock; that is, the harbor line.

Q. You notice the Globe Milling dock makes an angle in there? A. Yes, sir.

Q. You mean this point here. A. Yes, sir.

Q. The bow was even with that piling in there?

A. Yes, sir.

Q. Was the stern of the Boston out in the stream—was it on the same angle as the Globe Milling dock, or was it further out in the stream than the Globe Milling dock?

A. From the best of my recollections, from the port quarter—or the starboard quarter, at least, standing on the starboard gangway, you could see right straight along the side of the ship, and up straight along the Globe Milling dock.

Q. Just about on the line, then, with the line of the Globe Milling dock?

A. Approximately.

Q. That would bring the Boston inside the position of the Yucatan, the vessel lying at the Globe Milling dock? A. Just about would.

Q. Do you know, approximately, how wide the river is at that point where the Boston was lying?

A. Approximately, between docks, I believe it is 600 feet.

Testimony of E. J. Gavin)

Q. Between docks? A. Yes, sir.

Q. What was your position on the Boston at the time this accident happened?

A. I was the man in charge of the regulars attached to the ship in the service, the naval service.

Q. A regular navy man? A. Yes, sir.

Q. How many regulars were on board the Boston? A. Six, sir.

Q. What were you doing at the time this accident happened?

A. Sitting down eating, sir.

Q. Where was the mess table?

A. The mess table was midships on the port side of the gun deck.

Q. On the port side?

A. Yes, sir.

Q. Just tell what happened? What you saw, and what happened when the accident happened?

A. Well, the first intimation I had of it was when something struck the ahip and jarred her over, and everybody jumped up from the table, and we heard something crashing, and we didn't know what it was. We all started aft on the quarter deck. I realized that something was going on up on the forecastle, so I went up on the forecastle just in time to see the Yucatan swinging off, heading downstream from us. That was really all that I saw.

Q. What part of the Yucatan was touching the Boston at that time?

A. The starboard after quarter.

(Testimony of E. J. Gavin)

Q. Her starboard after quarter. Where was the point of contact with the Boston.

A. The first point of contact was at the—on the starboard side of the Boston, at the forward six pounder gun sponson.

Q. What was the next point of contact?

A. The next point of contact was the six inch gun, sir.

Q. What happened there?

A. The six inch gun was forced around through the ports that were closed to keep the rain and inclement weather off the steel work on the gun, and forced the gun through these two ports, jammed them in, and jammed the side of the ship in, and in so doing, stripped off the elevating gear of the gun, swung the gun up against the piano, jammed the piano up against the inner skin of the ship, which is only about one thirty-second of an inch thick, and jammed that in and broke the piano to pieces.

Q. What else was done there; what other damage?

A. Then the forward searchlight rail, which also includes the little rail around the sounding platform, was jammed in, and partly broken.

Q. That is located on top of the sponson, isn't it?

A. Yes, sir; and then a hook on one of the boom guys stripped off the canopy frame, and the canopy about two thirds of the distance on the steam launch,

(Testimony of E. J. Gavin)

which was sitting in its cradle on the starboard side amidships.

Q. The hook was on the Yucatan, was it?

A. Yes, sir.

Q. And the steam launch was on the Boston?

A. Yes, sir.

Q. Was any damage done on the port side of the Boston?

Mr. REED: It isn't pleaded, is it?

Mr. BECKWITH: Just the boom.

A. On the port side of the Boston, the ship jammed up against the dolphin, and being so jammed, she broke the port lower boom, which was laying in its cradle alongside the ship.

Q. Using these two boats as models, step over here and show the Court the position of the two vessels when you first saw them? (Witness arranges vessels).

Q. Is that about the correct position these two ships were in, when you first saw them?

A. About that.

Q. That is about the correct position, these two ships were in?

A. Yes, sir.

COURT: Were they touching when you saw them?

A. No, sir; they were just coming off from the collision.

Q. Did you notice anything that the Yucatan left on the Boston, parts of herself?

(Testimony of E. J. Gavin)

A. Yes, sir; she put in on the forward six pound sponson, she left some part of the wood work. I never found out what it was.

Q. Splinters?

A. Splinters hooked on to the hinges on the gun port.

Q. You were on the forecastle when you saw the Yucatan first. What did you do then?

A. I went aft to see what damage she was going to do there.

Q. When you went aft, did you go through the gun deck, or over the superstructure?

A. Through the gun deck, sir.

CROSS EXAMINATION

Questions by Mr. REED:

Mr. Gavin, what damage did she do aft on the Boston when you rushed through the gun room there to look?

A. No damage aft, sir.

Q. She was perfectly clear, wasn't she?

A. Yes, sir.

Q. And at the time you first saw her, by the arrangement of these models, her bow was off towards the west more or less?

A. Off towards the northwest.

Q. Yes, the northwest, and she at that time was under steam or drifting?

A. I couldn't say as to that, sir.

(Testimony of E. J. Gavin)

Q. The sponson is metal and projects over the boat. Was there paint on it? A. Yes, sir.

Q. From the Yucatan?

A. No, sir, not from the Yucatan.

Q. I mean splinters on there?

A. Splinters on there, wood.

Q. Was the sponson dented or bent?

A. No, sir.

Q. How thick is it?

A. Probably an inch thick there, sir.

Q. Well, a ship hitting it under any possible momentum would make some dent in it, wouldn't it?

A. Would if it had been steel against steel, or iron against steel.

Q. Not wood against wood?

A. Not wood against steel.

Q. Did the sponson scrape off any appreciable part of the Yucatan then?

A. I couldn't say as to that, sir. I never saw.

Q. Did you see the action of the six inch gun on the Yucatan when you rushed aft?

A. No, sir; we bounded off at that time, sir.

Q. Nor you didn't see the cargo boom do this work. On March 17, I believe the Boston was in the same position as it was on March 3rd, was it not—1914?

A. I don't remember when we did move.

Q. Didn't you say on your examination on the Boston that she was moved on the 8th of April?

(Testimony of E. J. Gavin)

A. If she was moved on the 8th of April, sir, she must have been there on the 17th of March.

Q. I will identify that then. I will ask you whether, on April 14th, at an investigation taken on the Boston, in the presence of Captain Blair, Commander, and other officers, you did not say, in answer to the question "Well, when did that change in the Boston occur? It took place how many days after the 3rd of March", you did not say "that occurred about three weeks ago—three weeks after? About three weeks after? Yes. It was only just last Friday. Last Friday it was done? Yes, today is the 14th, and last Friday would have been the eighth. No, it was done on the 3rd. Well, about the 8th of April. It was done somewhere around that? Yes." Does that identify the time any better when it was moved?

A. Yes, that is about the time—between the 3rd and 8th of April.

Q. It was done after the 17th of March?

A. Yes sir.

Q. So that on the 17th of March, the Boston was lying as she was on the 3rd of March?

A. Yes, sir.

Q. Mr. Gavin, I haven't understood—I am a little slow about those things, how far the stern of the Boston lay westward from the east harbor line of the Willamette River, on the 3rd of March, 1914?

A. The extreme stern would lay about sixty feet, sir.

(Testimony of E. J. Gavin)

Q. Is that port or starboard side?

A. Port side.

Q. Then the port side lay sixty feet in the harbor in addition to the beam of the ship there?

A. Yes, sir.

Q. And the gun projecting out besides?

A. The gun is forward, sir.

Q. The photographs will show how that was. Now, this cargo boom took away about two-thirds of the canopy. Now, how is that steam launch lying? Lying with her bow towards the bow of the Boston?

A. Yes.

Q. Was it the forward or after two-thirds it took off the steam launch? A. Forward.

Q. The forward? A. Yes.

Q. So at that time it must have been shooting off pretty well to the west, or else it would have taken all the canopy, wouldn't it?

A. At that time I should imagine, sir, she was pretty well straightened out.

Q. In other words, the boom hit the south end of the canopy and took out about two-thirds and left the rest intact. It didn't sweep it from end to end?

A. No, sir.

Q. Mr. Gavin, who is Captain Hall? Didn't he make some complaint to you about the location of the Boston?

A. He came to me to make complaint and I referred him to the Commanding Officer,—the Naval Board.

(Testimony of E. J. Gavin)

Q. To the Naval Board?

A. Commanding Officer of the Ship and the Naval Board.

Q. Do you know whether Mr. Beckwith was on the Naval Board at that time?

A. I couldn't say as to that.

Q. Who was Captain Hall?

A. I don't even know who he was.

Q. Was he a sea captain? A. Yes.

Q. Was he the only one?

A. He was the only one I ever knew that came aboard. One man came aboard.

Q. Did you ever have other complaints of her location?

A. No, sir, not that I remember.

Q. What was she dropped down for from where she was?

A. Was dropped down in accordance with instructions of the commanding officer of the Naval Militia and Naval Board, in order to facilitate the landing of people off ship.

Q. Had nothing to do with this accident?

A. No, not that I know of.

Q. How many feet was she dropped down? I don't want to confuse you. You said seventy. Mr. Hilton said forty.

A. That seventy in the first place was merely, I thought it was about that, but I have since found it was between forty and fifty.

Q. That is all right. She dropped down between

(Testimony of E. J. Gavin)

forty and fifty feet? A. Yes.

Q. To the north.

REDIRECT EXAMINATION

Questions by Mr. BECKWITH:

The stern of the Boston couldn't go any closer than it was on account of the depth of the water there? A. No, sir.

Q. What was done when the river would get deeper? Would she be moved in or allowed to stay in her same place?

A. It was the intention that when the river came up, we were to go in alongside the dolphin that had been placed six feet outside the harbor line;: after the dolphin was put out, then we moved the float in there.

Q. What was the stage of the river at that time? Was there very much water?

A. No, sir; was low water.

Q. What was the reason for the Boston being out so far?

A. In order to gain enough water to lie without laying on the bottom.

Q. Was it inshore as close as you could bring her safely?

A. Yes, she had 19 feet of water; between 19 and 20 feet of water on the port side of the stern after, whereas the ship drew 18 aft.

(Testimony of E. J. Gavin)

RECROSS EXAMINATION

Questions by Mr. REED:

What was the stage of the river at that time?

A. Low water.

Q. Dead low? A. Yes, sir.

Q. You swear it was dead low, do you?

A. As low as I ever saw it.

Q. That isn't what I mean. I mean on the Naval Board's recording gauge, how low was the river?

A. I couldn't say as to that.

Q. How do you know how much water there was?

A. I said low water, as far as I knew.

Q. I mean technically low water. Low water in the Willamette River. Do you mean zero?

A. I don't know about that.

Q. How do you know how much water—a naval man?

A. I said as low water as I seen in three years.

Q. How do you know how much aft?

A. Soundings; lead out.

Q. Then was it, say, to dead low water 17, 18½, where she was anchored? A. No, sir.

Q. It might have been, then, 15 feet above low water?

A. No, sir.

Q. Couldn't have been ten feet?

A. No, sir; because we took soundings every day.

(Testimony of E. J. Gavin)

Q. You swear it wasn't ten feet? A. Yes, sir.

Q. We are talking about the 3rd of March. I am not trying to trap you. A. Yes, sir.

Q. Talking about the 3rd of March. What would you move her in at all for, if she was all right where she was? If the water went up?

A. It was the intention of the Naval Board to move her in against the dolphin, in order to get holding.

Q. Why?

A. Because we had one line out astern, and it was run to the O'Reilly dock, and we didn't want to pull the piling out.

Q. Why did you have to hold the boat?

A. In order to keep her from going out in the stream further, when the west wind would blow.

Q. When the east wind would blow?

A. Yes.

Q. Going further out in the channel?

A. Yes.

Q. No danger from the current or logs, or anything—logs or drift?

A. We haven't any danger from that.

Q. None at all; what took out your dolphin?

A. The dolphin was taken out by our tugging on that with our ship itself.

Q. What made it tug on them?

A. Because the lines aft happened to be a little slack. There was rain, and the dry weather afterward dried the lines out.

(Testimony of E. J. Gavin)

Q. What made the boat tug the dolphin line?

A. Had a line upon us.

Q. Did you do it—the pressure? A. No, sir.

Q. What put the pressure on the boat that pulled out the dolphin?

A. The east wind.

Q. The east wind pulled her out? A. Yes, sir.

Q. And was there any current when she went out, when the dolphin went out?

A. Was about a knot and a half.

Q. But it was altogether the wind and the current?

A. It was all wind, as far as I know.

Q. And you were going to anchor inshore so as to get a better mooring ground, or whatever you call it?

A. Yes, we supposed the dolphin would be plenty strong enough to hold us in, and keep us up against that in order that we would yawl back and forth.

Q. You were mistaken, and pulled the dolphin out?

A. The ship pulled it out when the wind blew the ship out.

Q. You thought you would go closer to shore, to get a little more secure?

A. That is what we were after.

REDIRECT EXAMINATION

Q. You have been on the river for three years, have you?

(Testimony of E. J. Gavin)

A. Yes, sir.

Questions by Mr. EVANS:

Mr. Gavin, at the time the Yucatan was anchored it was made fast to the Globe Milling dock; did she have a line ashore from stern?

A. When she was made fast, yes.

Q. When she was tied up here? A. Yes.

Q. During this period of time. And do you know about how far the object was to which she was made fast on shore, from the Boston? I don't know what it was, whether it was a piling - - -

A. Well, I don't recollect, sir, just how far it would be.

Q. Could you give us an estimate of the length of the hawser she would have out astern there?

A. The length of the hawser would probably be 35 or 40 feet.

Q. Maybe we can get a better idea by reference to Claimant's Exhibit 2. Just to the left of that exhibit there is shown a small portion of a vessel. Is that the Yucatan? I believe it is admitted that is the Yucatan, isn't it?

Mr. REED; Yes, that is the Yucatan laying at the Globe dock.

Q. And the line going astern of that vessel ashore, it is made fast to what on shore?

A. Made fast to a cleat on the wharf.

Q. And that cleat is just about how far inside the Globe Milling Company's property, the fence line there?

(Testimony of C. R. Peckins)

A. Well, according to the picture—I couldn't say from there.

Q. You don't know from memory. You don't know how far that cleat is then from the Boston, do you?

A. From the Boston, no.

Witness excused.

C. R. PECKINS

A witness called on behalf of the Libellant, being first duly sworn, testified as follows.

DIRECT EXAMINATION

Questions by Mr. BECKWITH:

Mr. Peckins, what is your occupation?

A. Structural engineer; civil engineer.

Q. Civil engineer. What position, or commission, do you hold in the Oregon Naval Militia?

A. At the present time?

Q. Yes. A. Ensign.

Q. What commission did you hold in the Naval Militia March 3rd, back to Novombe, 1913?

A. A chief boatswain's mate.

Q. What did you have to do relative to the movement or preparing the mooring place of the Boston in November?

A. I superintended the driving of the dolphin and piling, and built the gangway and steps.

Q. Where is this gangway and steps?

A. It is located in connection with the Drake O'Reilly docks, at the foot of Halsey Street. The

(Testimony of C. R. Peckins)

steps are built from the top of the dock down towards the westward, and the gangway is built from the northward going south.

Q. Those are the steps you refer to (showing photo)? A. Yes, sir.

Q. What is the position of that gangway that you built with reference to this dock? How does it run?

A. The gangway is inside the harbor line.

Q. Which way does it run? Is it on an angle with the dock or a line with it?

A. It is very near on a line with the dock. It is inside the harbor line. I can't say how far.

Q. Well, you mean inside—you mean towards the shore from the harbor line? A. Yes, sir.

Q. That would necessarily be outside the line?

A. Well, outside—I mean inside the harbor line, towards the shore, towards the track.

Q. Well, where were these pilings driven; the after piling first?

A. The after piling—the after dolphin, was driven about 90 feet from the corner of the Drake O'Reilly dock.

Q. Show the Court from this blue print where the after piling was driven?

A. It was driven, measured 90 feet from the corner of this Drake O'Reilly dock, southward, six feet outside the harbor line.

Q. Did you measure that yourself?

A. Yes, sir.

(Testimony of C. R. Peckins)

Q. Where was the forward dolphin driven?

A. Driven opposite the sewer at the foot of Holladay Avenue. 194 feet between the two dolphins.

Mr. REED: The dolphin wasn't there at the time of the accident.

Q. You were aboard the ship about the time the after dolphin came down, weren't you?

A. Yes, sir.

Q. What was done with reference to mooring. the Boston when that after dolphin came down?

A. Why a spurshore was set between the beach and the side of the ship.

Q. What is a spurshore?

A. A spurshore is a long boom that one end is set on the beach and the other end is set on the side of the ship against what we call the chafing gear, or pad to keep from chafing the side of the ship, and that is supported by chains holding from piling into the water, and the ship is held in close to that to keep it from swaying back and forth.

Q. How long was this piling that was used?

A. Never measured it.

Q. Do you know about how long it is?

A. I don't have any idea. I know the original length, but it was cut off.

Q. What was the original length? A. 90 feet.

Q. But it has been cut off?

A. Cut off quite a little.

Q. How did you make your measurement from these docks for these dolphins?

(Testimony of C. R. Peckins)

A. Well, I stretched a line from the southeast—southwest corner of the Drake O'Reilly dock—southwest corner of the Drake O'Reilly dock to the northwest corner of the railroad dock,—The line is called a piece of signal halyard, to make a straight line; took my measurement from that, called that the harbor line; although at the time I thought that it was the right harbor line, I was inside the harbor line. I was using the wrong corner of the dock. It is inside the harbor line by eighteen inches to two feet.

CROSS EXAMINATION

Questions by Mr. REED:

What does inside mean? Do you mean between the line?

A. I mean towards the shore; not out in the channel.

Q. You were too far in. You were trying to get out in the channel, and you made a mistake and got inside?

A. No, sir, I intended to keep inside.

Q. How did you make a mistake?

A. Because I was going to the wrong corner of the dock.

Q. Which way, when you say inside the harbor line?

A. I mean towards the railroad on the shore side; I don't mean out in the channel.

(Testimony of C. R. Peckins)

Q. You say, then, that you got it where you wanted to. You were trying to get inside, weren't you?

A. Yes, sir, were trying to keep inside and I did keep inside.

Q. So, you didn't make a mistake?

A. No, sir.

Q. I thought you said you made a mistake?

A. I made a mistake, but was right in making a mistake.

COURT: Didn't go outside the harbor line?

A. No, sir, had permission.

Q. You didn't make a mistake, if you were right. What do you call that boom you put on land?

A. The spurshore.

Q. How do you make fast on the land?

A. Not made fast on the land; just rests on the beach.

Q. In the water?

A. No, it rests on the rock, or something permanent behind it, to keep it from burrowing into the soil.

Q. The bank there is almost perpendicular, isn't it?

A. No, sir.

Q. Pretty near straight up and down?

A. No, sir, I have climbed that bank quite often.

Q. You can't climb it except with your hands and feet, can you?

A. Yes, sir, can climb it without touching my hands to the bank at all.

Q. That is where it is a beaten track, but you

(Testimony of C. R. Peckins)

have to be very careful where not a beaten track, don't you?

A. That bank is on an angle like that (indicating).

Q. How much is that—45 degrees, isn't it?

A. I couldn't tell.

Q. Didn't you have your hand over 45 degrees, then, as a matter of fact? A. 45 degrees?

Q. 45 degrees, yes. You are an engineer, aren't you? A. Yes, sir. I wouldn't swear to it.

Q. And one end of this boom was on the earth side, and the other was against the boat?

A. Yes, sir.

Q. And how high up on the bank do you carry the end of the boom? A. Water's edge.

Q. Then she was sometimes in the water, and sometimes out of the water, the end of the boom?

A. Yes, sir.

Q. Sometimes under water?

A. I wouldn't swear to that.

Q. Well, do swear. You just said.

A. I don't know.

Q. Then you don't know how far it was?

A. I know it was at the edge of the water at the time.

Q. At what time?

A. At the time I built that gangway.

Q. That was in November? A. Yes.

Testimony of Captain G. F. Blair)

REDIRECT EXAMINATION

Questions by Mr. BECKWITH:

You have served in the United States Navy, have you? A. Yes, sir.

Q. How long in the United States Navy?

A. Six years and eight months.

Q. What was your rating at the time you were discharged? A. Turret captain.

Q. When were you discharged?

A. March 13, 1908.

Witness excused.

CAPTAIN G. F. BLAIR

A witness called on behalf of the libellant, being first duly sworn, testified as follows.

DIRECT EXAMINATION

Questions by Mr. BECKWITH:

What is you position in the Oregon Naval Militia?

A. I am secretary of the Naval Board, and also in charge of Naval Militia affairs, in the office of the Adjutant-General, and also commanding officer of the U. S. S. Boston.

Q. Did you hold that position on the 3rd of March, 1914? A. I did.

Q. Do you remember this accident, this collision?

A. I do.

Q. You have charge of the records of the Naval Militia? A. I do.

Testimony of Captain G. F. Blair)

Q. Have you a lease or any writing from the Navy Department of the United States, relative to the lease of the Boston to the State of Oregon?

A. I have the original contract between the secretary of the Navy and the Governor of Oregon, in regard to loaning the Boston to the State of Oregon.

Q. Let's see that (taking paper).

Whereupon proceedings herein adjourned until 2 P. M.

Portland, Ore. Wednesday,
October 28, 1914, 2 P. M.

CAPTAIN G. F. BLAIR

Resumes the stand.

DIRECT EXAMINATION continued.

Questions by Mr. BECKWITH:

Mr. BECKWITH: I offer this lease bewteen the United States Government and the State of Oregon in evidence.

Mr. REED: No objection, but if the Court please, I think the lease makes it possible to protect the claimant, because it says that the state agrees to defend and protect, but I think the pleadings should be made to show, so that no question may be involved.

Mr. BECKWITH: Inasmuch as it is a public document, I ask leave to withdraw the original, and substitute a copy.

Marked "Libellant's Exhibit B-2".

(Testimony of Captain G. F. Blair)

Mr. BECKWITH: I call the Court's attention to one paragraph which is pleaded.

Mr. REED: I don't think any doubt about that.

Mr. BECKWITH (Reading): "The State of Oregon hereby agrees to keep said vessel in good order and proper repairs, as set forth in the next succeeding paragraph, and to abstain from making, or causing to be made, any alteration in the hull or machinery, or in any arrangements of the hull, machinery, spars, boats, or other equipment or apparel of the vessel, except such as may be authorized in writing by the Secretary of the Navy." So that he claims binds the state.

Mr. REED: I think Section 9 binds the state. I would like to have that read.

Mr. BECKWITH: You can read that.

Mr. REED: Would it be proper to read Section 9, into the record?

COURT: I understand copy of that is in evidence, so you can refer to that later.

Q. Have you the original lease between the Oregon & Washington Railroad & Navigation Company, and the State of Oregon?

A. I have (producing paper).

Mr. BECKWITH: I offer that in evidence.

Mr. BECKWITH: This is a copy. I will ask the same permission to withdraw the original. This is merely to show that we have the right to cross the right of way, and to use the anchorage in front of their property.

(Testimony of Captain G. F. Blair)

Mr. REED: I make the objection the Railroad Company can't give any rights in the matter whatever. I have no question about any controversy between the state – – –

COURT: This only shows a right of way across the property.

Mr. BECKWITH: That is all we claim.

Marked "Libellant's Exhibit C-2".

Q. Captain Blair, what experience have you had as an officer in the United States Navy?

A. I am a graduate of United States Naval Academy. I served two years at sea as midshipman, and two years at sea as ensign.

Q. Were you aboard the Boston the day of this accident?

A. I was; not at the time of the accident, but immediately afterward.

Q. How soon afterwards?

A. The accident happened at 12 o'clock noon, and I was aboard the ship by about half past one.

Q. Did you measure the current at that time?

A. I measured it at about two o'clock or a little thereafter.

Q. How did you measure it?

A. I took a heavy box, threw it overboard, even with the bow, and timed it with a stop watch from the time I threw it overboard until it passed the stern; took the interval of the passing of the box.

Q. What was the speed of the current?

A. It worked out 1.88 knots per hour.

(Testimony of Captain G. F. Blair)

Q. On this blue print, show the direction of the current, with reference to the Globe Milling Company dock on that day.

A. Well, the current sets in from the steel bridge; has a tendency to set in towards the shore in here; comes in this way, and then curves out afterward. The tendency is to set in towards the shore here.

Q. It sets in towards the Boston?

A. Yes, towards the Boston.

Q. Did you have any photographs taken the afternoon of March 3rd, regarding the Boston?

A. I did. I had a photographer come over and take photographs that day.

Q. Are these the photographs which were taken under your direction?

A. These are the photographs.

Mr. BECKWITH: I offer these in evidence.

Photographs marked "Libellant's Exhibits D, E, F, G, and H."

Q. You were commanding officer of the U. S. S. Boston, and of the Oregon Naval Militia that day, were you not? A. I was.

Q. Had any complaints ever been received by you relative to the position of the Boston, prior to the date of this accident?

A. There had been no complaints whatsoever.

Q. Are you familiar with the requirements and regulations of the United States Navy regarding the training of these broadside or midship guns?

A. I am.

(Testimony of Captain G. F. Blair)

Q. Similar to this six inch gun? A. I am.

Q. What do the regulations require?

A. The regulations are not in writing. The customs of the service are that every gun has a particular position, and it shall be kept in that position at all times except when training under orders. The battery is trained every day in the morning. At other times the gun remains in a certain position. The position is different on different ships. Do you want me to state what they are on board the Boston?

Q. What is the regulation regarding this six inch gun?

Mr. REED: He said there was no regulation; said it was a custom.

Q. What is the regulation concerning the training of this six inch gun which was damaged?

A. The six inch gun which was damaged, must be trained abeam at all times; that is the position it is required to take by the structure of the vessel, and by the customs of the service, in regard to the Boston.

Q. Could those gun shutters be closed, if the gun were in any other position than abeam.

A. For that particular six inch, they could not be.

Q. I hand you Libellant's Exhibit D; explain what that shows regarding the current and all.

A. That is a picture I had a photographer take from the fore part of the ship, showing the forecastle, the bow of the ship, the stem with reference to the

(Testimony of Captain G. F. Blair)

Globe Milling Company dock. It also shows the angle of the dock here, and the place where the Yucatan was lying.

COURT: The Yucatan was lying out here?

A. Yes, sir; was lying alongside this dock. Her stern was in here like this. She was headed up that way, and the weather condition show in this picture a slight drift over this way; you can see the effect on the water. That was taken to show the position of the bow relative to the Globe Milling Company dock, where the Yucatan was lying.

COURT: Taken at 2 o'clock in the afternoon?

A. Taken between two and four, yes, sir; in the afternoon; just as soon as we could get the man over there.

Q. The Boston is in the same position in that photograph, as she was when the accident happened?

A. Absolutely; she hadn't been moved at all, except the slight movement caused by the collision.

Q. I hand you Libellant's Exhibit E, and ask you to explain what that is.?

A. That is a picture taken from the forecastle to show the position where the Yucatan first struck the ship, the Boston. It shows the six inch sponson, with this circular part here, steel structure; shows the shutters that closed around the six pound gun; shows the splinter on the hinge where these gun shutters open and close, where the boat first struck; it also shows this stuck inside the outermost line of that sponson. The picture was taken in this way,

(Testimony of Captain G. F. Blair)

at an angle from the forecastle out towards the river. That six pound gun is trained exactly fore and aft.

COURT: Was it trained that way at the time of the accident.

A. Yes, it has to be. The shutters closed around it, and there is the exact position for it to have, and the splinters are shown there on the hinge of the shutter.

COURT: I understood you to say a moment ago that this is not the six inch gun.

A. There is six inch and *s* six pounder.

Q. Where was the six inch gun?

A. The six inch gun is aft, toward the stern. It is back behind the sponson; looking at this picture.

Q. I hand you Libellant's Exhibit F, and ask you to state what it is?

A. This picture was taken to show the condition of the steamer which is in the cradle, the place which is made for it specially, at the time when the ship is secured for sea; is as far inboard as it can be put, made for that purpose. It shows how the canopy and frame was taken off. That is looking from forward aft, looking from about the bridge toward the stern of the ship.

Q. What bridge is shown in that?

A. That shows the Broadway Bridge.

Q. I hand you Libellant's Exhibit G and H, and ask you to explain those.

A. Those two pictures were taken, showing the

(Testimony of Captain G. F. Blair)

gun, the six inch gun which had been damaged, with the shutters and also the piano.

Mr. EVANS: Which is which? They are both the same?

A. One shows the piano more particularly. G and H were both taken to show the gun and the piano, and their relative positions. And the damage which was caused to the port shutters. This six inch gun, its regular position is abeam; that is, right angles to the fore and aft line of the ship, and the shutters close down upon it. When the Yucatan struck the Boston first, and glanced off and hit the gun, it knocked the gun towards the stern, and made this gun turn around, made it train—what we call training backwards; when it did that, it came against this shutter which is tight around it, with such force that it forced the shutters open, and tore it, tore the leaf right out; also forced the gun, hit on an angle, it not only forced it aft, but also inboard. Taken right after, that same day. These two shutters ordinarily are tight together, just like that, and there is a hole in here, a semi-circle cut out, a semi-circle in each one. When they came down against it, it forced this shutter that way, and this one that way;—tore it, made a hole in the shutter. It also knocked the gun in; the whole gun itself, slides in this sleeve, fast in the carriage; so the whole gun comes inboard. It comes in six or eight inches. When it came in that way and went around, it caught this piano which was standing by the gun, but not close

(Testimony of Captain G. F. Blair)

enough to have been hit in any other way unless the gun came in; it caught the piano and forced it over against the side of the ship. This picture also shows the fact that the training gear, elevating gear, was trained. Here is the wheel like this, on this side of the gun. Here is also a shield, similar to this shield here, curving out, with this side of the gun, shows there being caught over the piano. There is a wheel down there, as shown. The force must have been very great to do it. The piano was sitting in there, and we train that gun every once in awhile; done every day, as a matter of fact; trained from forward back and amidships; and closed, is kept in that position all the time, and that gun can also move freely around there, around the piano without hitting it.

Q. Does it take much force to bring that gun back into battery, as you said?

A. It takes a great deal of force. They have recoil cylinders, filled with a special mixture in order to return it to battery.

CROSS EXAMINATION

Questions by Mr. REED:

Captain Blair, did you say there were regulations, that the gun should be pointed, as you call it, abeam, I believe?

A. I said there were no written regulations in the regulation book, but the customs of the service

(Testimony of Captain G. F. Blair)

are to keep them in a certain position, and the structure of each ship is specially designed for a particular position for every gun.

Q. Is that all done regardless of any possible damage to others? Is it an inexorable rule?

A. Yes, sir; it is never altered, without orders from the Secretary of the Navy, or the President of the United States.

Q. So that gun was left there because to change it would have broken an order of the Secretary of War or the President?

A. It wouldn't have broken an order, but is contrary to custom.

Q. I mean it would not be moved without an order from – – –

A. No, sir, not unless I had an order from the Governor or the Adjutant-Genetal, my immediate superior.

Q. Those guns were not changed after the third of March?

A. Ever since then—I don't know exactly what time we started to do it, but as a matter of convenience, we have trained, whenever the weather permits, have trained the guns aft and left in that position.

Q. Have you had permission from the Secretary of War or the President to do it?

A. I talked to the Adjutant General about it. I said unless I had an order from my immediate superior officer.

(Testimony of Captain G. F. Blair)

Q. So since this happened, you have done that, have you?

A. On occasions. I would like to state, also, on that, Mr. Reed, that the Assistant Secretary of the Navy passed through this city, and commented on the fact that some of our guns were not in the same positions as others, the same angle.

Mr. BECKWITH: Was that since the accident?

A. Since the accident.

Q. Did you tell him that a ship had run into them and hit them?

A. I made a report to the Department.

Q. No, but did you tell the Assistant Secretary that a ship had run into them and hit them?

A. I didn't see him at all.

Q. How do you know he said that?

A. I have a written letter from him. I have seen a written letter from him.

Q. Did anybody write him while he was here? What did he say about the ship running into that?

A. I don't know.

Q. Now, do the members of the Naval Militia ever indulge in target practive? A. Yes, sir.

Q. Do they shoot indiscriminately, without regard to any—pursuant to regulation or custom? Is everything done along the line—don't they ever take into consideration thw advantages of position or conditions existing around them?

A. Always take into consideration when they are firing guns.

(Testimony of Captain G. F. Blair)

Q. But not when they are leaving them at rest?

A. No, sir.

Q. Captain, you referred to a photograph showing a six pounder, projecting fore and aft from the sponson of the ship, and you said the gun was there when this took place. The Yucatan didn't hit that gun, did it? A. No, sir.

Q. How could it have been way inside that sponson?

A. How could the gun have been inside the sponson?

Q. No, the point of contact?

A. The Yucatan—the part that hit the sponson was below the gun, below the six inch gun. You might have some overhang or underhang there, that would hit any part of the ship without necessarily hitting something above it.

Q. So there is rigging on the Yucatan, is there?

A. I don't know. I have never even seen the Yucatan.

Q. Never seen her?

A. That is, to take a real look at her.

Q. Please look at the photograph I will show, you, called "Claimant's Exhibit 3", the Yucatan being in the foreground, and answer whether or not she has rigging on her.

A. She has a very little rigging, yes, sir.

Q. Well, she has some rigging anyway.

A. She has some rigging. She hasn't a lot of standing rigging and booms.

(Testimony of Captain G. F. Blair)

Q. If anything hit below that six pounder pointing out there, a number of feet, the point of the six inch gun having hit the dead light, that six inch gun would have been in a position to have caught on the rigging, wouldn't it?

A. It depends on how you are out of the water.

Q. I am asking a question. You are an expert on design. How does that six pounder escape the rigging, if she scraped along back of the center of the sponson?

A. Because the six pounder is outside the line in which that ship hit our ship.

Q. Towards the west?

A. Yes, towards the shore.

Q. I thought you said the boat hit way inside the sponson.

A. No, I said hit inside the outer line of the sponson; tangent to that line which is parallel to the fore and aft line of the ship. Touched inside the tangent to that sponson which should be parallel to the fore and aft line of the ship. May I illustrate that for you?

A. I understand what a tangent is.

Mr REED: Now, if the Court please, I want to make a formal motion to strike out the evidence of this witness, regarding the customs of keeping those guns out that way, because I think it is immaterial.

COURT: Very well.

(Testimony of Captain G. F. Blair)

REDIRECT EXAMINATION

Questions by Mr. BECKWITH:

There are some questions I neglected to ask, Captain. What was the occasion and reason for the board of investigation which was held aboard the Boston, as alleged in the pleadings?

A. What was the reason for the Board of Investigation?

Q. Yes; how did that come to be held?

A. It was held according to Navy regulations.

Q. Written regulations?

A. Written regulations, and also because I telegraphed to the Department for instructions; being under State control, I wished to know also what the Secretary of the Navy desired, and I telegraphed for instructions and got written instructions from the Assistant Secretary of the Navy to go ahead and hold a Court of Investigation, in accordance with U. S. Regulations.

Q. What was the purpose of this Board of Investigation?

A. To find out what the cause of the collision was; whether or not the Yucatan was responsible for the collision, and an itemized cost of all repairs which would have to be made, in order to repair the damages done by the collision.

Q. Did this Board have authority to call witnesses?

A. It has authority to call witnesses, yes.

(Testimony of Captain G. F. Blair)

Q. What was the cost of that Board of Investigation to the State of Oregon?

Mr REED: I object to that because I don't know of any law—

COURT: Let him put it in.

A. The total cost was $54.

Q. Now, what was done regarding the repairs to the Boston?

A. I asked for bids from several firms here in town that do such work, and received three different bids, as I remember, and accepted the lowest bid which covered the work we wanted done.

Q. Who was that?

A. It was placed with the Willamette Iron & Steel Works.

Q. What was the amount of that bid?

A. The amount of the bid was $356.

Q. Of what did that bid consist? What was the bid for? State what the repairs were to be.

A. The repair items were, forward starboard six inch gun shutters; renewing two steel plates; renewing broken parts of brass strips furnishing new packing for same; vertical plate on after side of gun port to be faired; consisting of cutting out about twelve rivets, heating plates and bringing same back to original position; re-driving the rivets removed; repairing liner plates on side of hull, which consist of fairing same; renewing broken portions of half round iron beading; repairing pipe railing on forward starboard six pounder gun sponson, putting

(Testimony of Captain G. F. Blair)

same in original position; repairs to steam launch; renewing hard wood hatch combing on forward end; renewing pipe awning stanchions in original position, including brass connections for same; renewing forward half of canopy of No. 4 or 5 canvas; two corrugated iron floor plates in steam launch; splicing port boat boom with steel straps.

Q. What was the total cost? A. $356.

Q. Have those repairs been contracted for?

A. They have been contracted for. They have been covered all by written proposals.

Q. Were they contracted for by the Government, or the State of Oregon?

A. By the State of Oregon, with authority of the Naval Board.

Mr. BECKWITH: Mr. Reed is willing to admit this price is a reasonable price.

RECROSS EXAMINATION

Questions by Mr. REED:

That covers all the damage done?

A. Yes, sir; that is all the damage, as far as I know. I fully believe that to cover all the damage.

Q. So there is nothing left after this is over?

A. I don't expect there can be a possible thing left.

Questions by Mr. Evans:

May I ask a question or two? I don't know where the county's position is. Captain, were you familiar

(Testimony of R. R. Vineyard)

with the manner in which the Yucatan was tied up to the Globe Milling dock prior to and at the time of the accident?

A. I have never inspected the lines the Yucatan had out. I knew she lay just forward of us, alongside of that dock, and she was in the habit of moving forward and aft occasionally when she was using her different hatches for loading.

Witness excused.

R. R. VINEYARD

A witness called on behalf of the Libellant being first duly sworn, testified as follows.

DIRECT EXAMINATION.

Questions by Mr. BECKWITH:

Were you an enlisted man, a member of the Oregon Naval Militia on March 3, 1914?

A. Yes, sir.

Q. What was your position at that time?

A. Ship's keeper at the time.

Q. What was your rating in the Naval Militia?

A. Master at Arms.

Q. Master at Arms is a sort ot policeman on the ship? Where were you at the time of this accident?

A. On the forecastle of the Boston.

Q. On the forecastle of the Boston?

A. Yes, sir.

Q. Now, using these two models of ships here for illustration, come here and show what was done?

(Testimony of R. R. Vineyard)

A. (Arranging blocks) As near as I remember, the Yucatan lay in a position about like that. The Boston lay here. The relative distance between the bow of the Boston and the dock, I don't remember, but I imagine in the neighborhood of 90 or 100 feet.

Q. Where were you standing?

A. I was standing right here on the forecastle of the Boston; at the time she gave her first signal for the draw, I was at the mess table, and got up, and left the mess table, and went out on the forecastle, and watched the Yucatan pass. When I came out on the forecastle, the Yucatan was swinging on her stern line, and in a position about like that. Swung around slowly in such a manner.

Q. Show where that stern line was fastened on the Yucatan.

A. Well, the stern line was—this is not hardly the proportion here. I believe that this cleat that the Yucatan was fastened to was further up on the dock than where this shows it. Was fastened in this manner, and swung on her stern. She reached a position about here, if I remember correctly, when the captain sounded the second signal for the bridge. When she reached a position about like this, she sounded the danger signal. At the time of sounding the danger signal, I heard them give a signal, that is merely a jangle of bells, to the engine room. Now, I imagine to start his engines up with more speed. She reached this position, and started to go ahead with

(Testimony of R. R. Vineyard)

a sidewise motion. He had cast off about here, and came to the sidewise motion, raking two or three piles on the Globe Mill dock right in here, with the stern, but not to do any perceptible damage; proceeded on a motion something on this manner, catching us at a point about here on our bow, with his starboard side of the ship about amidships; throwing us against the dolphin on the other side of the ship, and we came back slowly, and he started to straighten out, at the same time raking the forward sponson on the starboard side of the Boston, and the stern hitting the six inch gun, just after of it, and then veering off in a manner of this sort.

Q. Did he hit the search light rail?

A. That I am not certain. He must have hit the searchlight rail, because it was damaged.

Q. Well did you see anything happen to the steam launch?

A. I couldn't see from where I was standing.

Q. Did you see his boom swinging any?

A. Yes.

Q. What did you see?

A. I saw at the time he hit our sponson, I heard something snap. A line I suppose, was steel cable, or his rigging snapped, and saw the boom dangling.

Q. What was on the end of the boom?

A. His cargo hook, I imagine.

Q. His cargo hook?

A. Or a block. I couldn't clearly say whether a cargo hook or a block.

(Testimony of R. R. Vineyard)

Q. Did you stay on the forecastle of the Boston all the time?

A. No, sir; as soon as he reached a position about like this, I mounted up on the superstructure.

Q. Then what did you do? What did you see there?

A. The boat had reached a position about like this, and was all clear of us by then.

Q. Did you see his cargo—or that hook swinging at all?

A. Swinging, yes, sir.

Q. Where was the hook at that time? In what position was the hook?

A. Hook?

Q. Yes.

A. It was swinging back and forth in the air; from the end of his cargo boom.

Q. Was the hook swinging anywhere near the canopy of the Boston's steam launch?

A. He was past the steam launch; I imagine about down to here by then.

Q. Was the boom on a foremast or a mainmast?

A. On his mainmast.

Q. About where did the six inch gun of the Boston strike the quarter of the Yucatan?

A. It is shown in the photograph. Well, I imagine about midships; I couldn't say clearly.

Q. Have you seen the scratches or marks on the Yucatan since then?

(Testimony of R. R. Vineyard)

A. Yes, I have noticed on several occasions, a long scratch along the side of the Yucatan?

Q. Show us, from Claimant's Exhibit 4, about where the six inch gun of the Boston struck it.

A. On this side of the ship.

COURT: Which side?

A. On the port side.

COURT: About midships?

A. About midships; would be about in here. Now there is a line running from here, on aft, sort of a crease on the Yucatan, which was left by the six inch gun.

Q. You saw the piano since this accident, did you?

A. Yes, sir.

Q. Would you say it was a complete loss?

A. Yes, sir.

Q. Where was the mate on the Yucatan?

A. Which one?

Q. The second mate?

A. Tending the stern line.

Q. The Yucatan made two signals to the bridge, and then gave the danger signal? A. Yes, sir.

Q. And she was turning all the time? A. Yes.

Q. About what angle was she from her dock when she blew for the bridge the first time?

A. The angle of about 30 degrees, I imagine.

Q. What angle was she when she blew the second signal for the bridge?

A. About 100 or 110 degrees; 120; somewhere in there. I cannot say exactly.

(Testimony of R. R. Vineyard)

Q. About what angle was she when the danger signal was sounded?

A. In the neighborhood of 150 or 160 degrees; possibly more; I couldn't say precisely.

CROSS EXAMINATION

Questions by Mr. REED:

Mr. Vineyard, did you see any cause for the danger signal? A. Beg pardon?

Q. What was the condition of the bridge when the danger signal was blown?

A. When the danger signal was blown, I couldn't see the bridge from where I was standing. I was still on the forecastle. I didn't see the bridge until after I had mounted up on the superstructure.

Q. How was the bridge then?

A. She was in a position about like that (indicating) just opening.

Q. Just beginning to open?

A. Just beginning to open. You could—there was a space in between the two lifts on either side; oh, it was in a position, I imagine, about like that (indicating).

Q. Can you use words to describe it, so the stenographer can get it? Could you jump across it?

A. No, I couldn't jump across it. I imagine was a distance between the two spans of about 15 feet.

Q. That view that you had of the bridge, as I

(Testimony of R. R. Vineyard)

understand it, was after the danger signal blew, and after you had gone to the superstructuer to see?

A. Yes, sir.

Questions by Mr. EVANS:

Now in describing the position of the Yucatan, when she was casting off, you illustrated that with the models here, and the line from the model of the dock. Do you understand that the stern line was extending at right angles to the beam of the ship over towards the dock, or was it reaching out astern?

A. It was reaching around the stern, I would say, to these chocks on the other side.

Q. Let me show you Claimant's Exhibit 2, which has been identified as showing the stern of the Yucatan, to the left of the picture, with the stern line, the hawser that runs across to the cleat.

A. You wish me to state where the line was at the time he was turning?

Q. Yes.

A. Instead of passing from this cleat—it don't show where made fast, I suppose on the dock. Instead of fastening on the cleat, as shown in the picture, it had to run to the chock on the other side of the ship; that is, to the stern of the ship; there is two chocks, one on each side.

Q. And was a chock on each side of the ship?

A. On the ship on this side over here, not visible in the *pictur*.

Q. That would be considering the photograph of the ship, starboard or port side?

(Testimony of R. R. Vineyard)

A. Starboard side.

Q. But it was extending from that chock, back towards the cleat on the dock, was it not?

A. Yes, sir.

Q. About what length of line?

A. I can't say exactly.

Q. Well, approximately, how much?

A. Why, I imagine he had from the chock to the cleat on the dock, he must have had 50 or 60 feet of line out; possibly more.

Q. 50 or 60 feet of line?

A. Possibly more.

Q. And as his vessel began to turn, do you know whether or not the winch was being operated to shorten this line?

A. Yes, sir.

Q. What effect would that have on the vessel? Would it pull it towards or away from the Boston?

A. Well, it would pull it forward and away from the Boston.

Q. Could you illustrate it here with a string?

A. The string made fast here. Of course, this tack you have here—the chock was really about in this position, making fast here. This line, instead of extending down, was extending in this manner.

Mr. REED: Please say the directions.

A. Around the stern of the ship and taking up on the winch, you draw it in, at the same time pulling it around.

Q. Yes, but let's begin at the first. When the

(Testimony of R. R. Vineyard)

captain gets ready to cast off here, he orders the line from the bow cast loose, does he not?

A. Yes, sir.

Q. Now, then, when you are just casting off that bow line, what position is the stern line? Is it extending sternmost or is it extended at right angles to the beam?

A. Extending stern.

Q. And when he gives the order to cast off forward, then your winch would begin to work the stern line, would it not?

A. The stern line prior to that; as a general rule, I believe there is two stern lines out, one from the chock of the starboard line, and one from port. The stern line from the starboard line, in this particular case had been moved forward in order to swing the ship; had to be in order to swing the ship on the stern.

Q. What I am getting at, would the effect on the vessel, when you begin to turn the ship here—I want to know whether or not the boat will be pulled in closer towards the Boston at any time during the operation beginning from the first up to the last?

A. No, sir.

Q. It would not? A. No, sir.

Q. It would just be held taut up to the cleat?

A. If anything, she would be pulled forward a little, be pulled forward on account of the line placed in the chock ahead.

Q. Wouldn't that depend on at what point she was attached to the dock? She was attached to

(Testimony of R. R. Vineyard)

the cleat, apparently, from this photograph. It was astern. A. Yes.

Q. Wouldn't the vessel naturally be pulled back towards that cleat for a perceptible distance?

A. I don't think a captain, or any seafaring man, would attempt to swing – – –

Mr. REED: I object to this. This is taken when the Yucatan was fast to the dock, and is different, and for that reason cannot be used.

Mr. EVANS: That is what I want to find out. I don't know.

A. If you attempted to try to swing from here, you would have to come back. That is, come back sufficiently to give you a purchase on that line to swing around.

Q. Whether that was done in this case or not, you don't know, do you?

A. I think it was, because he couldn't have swung, unless he did.

Q. Now, then, at the time the first signal was given, had he cast loose the stern line or not?

A. No, sir.

Q. At the time the second signal was given had he cast off? A. No, sir.

Q. At the time the danger signal was given had he cast off?

A. Well, now, I couldn't say exactly whether it was or not. It was a matter of about five or six seconds between the time the order came to cast off the stern line, and the danger signal, and I don't

(Testimony of R. R. Vineyard)

remember clearly whether before or after the danger signal.

Q. But you feel fairly sure that at the time he gave the second signal, he was approximately around about 120 degrees, on an angle, somewhere near that?

A. Yes, sir.

Q. You have been to sea with Captain Paulsen, haven't you?

A. As a passenger, yes, sir.

Questions by Mr. REED:

Mr. Vineyard. I want to ask you whether you were looking at the Yucatan when she blew her first signal for the bridge? Do you remember anything about the movement of the lines before the danger signal?

A. There was no movement of the lines before the danger signal, as far as I know, because when he sounded the first signal, I was still in the mess room.

Q. You were in the mess room, and couldn't see?

A. No, sir.

Q. You ran out when the danger signal blew?

A. No, sir; I went out; walked out, just after he sounded the first signal for the bridge.

Q. I want to ask you another thing. After you were looking at it, isn't it a fact that the line on which this boat was swung that was worked on a winch, was moved south on the dock at least 120 feet to another cleat or cavel up there?

A. I couldn't say.

Q. You don't know whether it did or didn't?

(Testimony of G. A. Hoffman)

A. No, sir.

Q. You weren't looking? A. No, sir.

Q. So you are not saying, are you, he was made fast to any cleat, and stayed in any cleat where the tack is put in that board?

A. I couldn't say, because I couldn't see the cleat.

Q. You are not saying he stayed fast to any cleat shown in any photograph? A. No, sir.

REDIRECT EXAMINATION

Questions by Mr. BECKWITH:

You are acquainted with the second mate?

A. Yes, sir.

Q. And so you were out on the forecastle to see him go by? A. Yes, sir.

Witness excused.

G. A. HOFFMAN

A witness called on behalf of the libellant, being first duly sworn, testified as follows.

DIRECT EXAMINATION

Questions by Mr. BECKWITH:

What is your occupation, Mr. Hoffman?

A. Eiler's Music House.

Q. What position do you occupy with them?

A. In the sales department; have charge of the sales department.

Q. Are you familiar with the value, the prices

(Testimony of E. J. Gavin)

of the auto-pianos, similar to the one which was destroyed on the Boston? A. I am.

Q. What is the price, the sales price?

A. The retail price is $750.

Q. Has a new piano been placed aboard the Boston to replace this old one?

A. I don't know.

Q. Did you see the one that came back from the Boston? A. No, sir.

Witness excused.

E. J. GAVIN

Recalled for further

DIRECT EXAMINATION

Questions by Mr. BECKWITH:

This morning we were talking about the distance of the port quarter of the Boston from the harbor line. Now, state what was the distance from the outermost part of the Boston, the hull of the Boston, from the harbor line.

A. At the greatest distance?

Q. Of the hull, yes.

A. That would be 66 feet from here.

COURT: Wasn't the Boston more than six feet wide?

A. That is all she is there, your Honor. And sixty on the otherside.

Q. The outermost point was the stern, then?

A. Yes, on account of the angle in here of the

(Testimony of E. J. Gavin)

harbor line, you see would bring us—this is a smaller angle here than here, and this is the greatest distance between the ship and the harbor line, which is sixty feet, and across the stern is only six feet; so really the furthest part out in the stream, would only be sixty six feet at that time.

COURT: What is the beam of the Boston?

A. The beam here, sir, is about 42 feet.

COURT: What is it there at the stern?

A. Six feet.

Q. But after you get beyond the bulge, beyond the curve?

A. This is not really the curve of the stern of the ship. It comes in closer than that. You see this is drawn nearer to scale, clear from here, nearly the same position clear to the stern. It isn't riding that way; when it comes here, starts gradually tapering in, has an overhanging stern, and really across right here is only six feet wide.

COURT: How far would it be 20 feet forward?

A. 20 feet up here?

COURT: Yes.

A. Would probably be in the neighborhood of 20 feet wide, and up here again would be 30 and so on up to midship line, which would be the widest part, would be about 42 feet, and then after she comes to here again, it starts tapering again.

(Testimony of Captain A. C. Paulsen)

CROSS EXAMINATION

Questions by Mr. REED:

That boat is sharp at both ends, isn't it?

A. No, sir; not particularly sharp. The bow, of course, is sharp, and then it goes down to the first quarter of the ship.

Q. I know, but almost so, isn't it?

A. Yes, sir.

Q. Looks that way to a landsman, anyway?

A. Very nearly; only six feet width across.

Witness excused.

LIBELLANT RESTS.

CAPTAIN A. C. PAULSEN

A witness called on behalf of the Claimant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. REED:

Please state your occupation?

A. Master mariner.

Q. How long have you been a master mariner?

A. I got my first command in 1903.

Q. 1903? What ship was that on?

A. That was on the sailing ship.

Q. What?

A. A sailing ship to San Francisco.

Q. Where did she run?

(Testimony of Captain A. C. Paulsen)

A. She ran between San Francisco and Puget Sound.

Q. What other boats have you had command of?

A. Why, another sailing ship, a larger ship we called the Reaper.

Q. What tonnage did she have? A. 1500.

Q. What other boat?

A. The George W. Elder.

Q. How long were you on the Elder?

A. I was on the Elder nine months.

Q. Where did you run? Where was the Elder's run?

A. Between coastwise, Portland and San Diego.

Q. And San Francisco?

A. San Francisco and San Pedro.

Q. San Pedro. Before 1903—did you say 1903?

A. Yes.

Q. How long have you been at sea?

A. Nine years.

Q. How old are you, Captain? A. 35 years.

Q. As I understand your figures, then, you have been in charge as master mariner for 11 years, and you were at sea nine years before that?

A. Yes, sir.

Q. That is 20 years? A. About 20 years.

Q. Do you hold a license? A. Yes, sir.

Q. From the Government for the handling of ships? A. Yes, sir.

Q. Well, at the present, what is your occupation?

A. Beg pardon?

(Testimony of Captain A. C. Paulsen)

Q. What ship are you in charge of now?

A. Steamer Yucatan.

Q. The ship we are talking about?

A. Yes, sir.

Q. You hold a license as captain, master?

A. Yes, sir.

Q. State what local harbor licenses as pilot you hold?

A. Well, I hold a local license for the Portland harbor.

Q. What else?

A. Columbia River Bar, as far as Astoria, San Francisco, San Pedro, San Diego and a master license, unlimited master's license for steam and sailing vessels.

Q. Now, on March 3rd, you had no local license for the harbor of Portland. A. No, sir.

Q. But, at that time, did you have a license for these other places? A. Yes, sir.

Q. All of them? A. All of them.

Q. How long after the 3rd of March did you apply for your local license—about?

A. About two weeks.

Q. Do you remember what date it was?

A. No, I don't. It is on the license.

Q. The Boiler Inspectors fined you, I believe, for not having a license?

A. No, the Collector of Customs fined me.

Q. Well, did they issue your license before or after that time had expired? A. Afterward.

Q. After, as soon as it was expired?

(Testimony of Captain A. C. Paulsen)

A. Yes, sir.

Q. Now, then, in moving vessels in the Portland harbor, I believe the regulations call for a local pilot?

A. Yes, sir.

Q. And when you call for a local pilot, is there any charge for it, for the pilot that goes with ships that move around the harbor?

A. Not for our ships; not for ships that run here regularly.

Q. How long had you been master of the Yucatan previous to the 3rd of March?

A. About eight months.

Q. About eight months; and just previous to that on the Elder? A. Yes, sir.

Q. And they are both owned by the same company, I believe? A. Yes, sir.

Q. And which is the biggest boat?

A. The Yucatan.

Q. What is her tonnage?

A. 3500 gross tons.

Q. Well, during that eight months, had you called frequently at the Globe dock?

A. Yes very frequently.

Q. Had you ever used any method of handling the boat at the dock, except that described by Mr. Vineyard?

A. Not getting away under our own steam, we always got away that way.

Q. Sometimes, are you there without your own steam?

(Testimony of Captain A. C. Paulsen)

A. Once in a great while we have a tow boat.

Q. How do you work it when you haven't steam? Have a tow boat?

A. When we have no steam, yes, we have a tow-boat.

Q. Have a tow boat? A. Yes.

Q. Yes, but when you have steam, do you always go under your own power? A. Yes.

Q. Now, Captain, state what line it was that was used by you on the 3rd of March at this time, what lines were cast off, and what lines were used?

A. Why, getting under way you mean?

A. Yes, when you left the Globe dock.

Q. Well, about five minutes before we got ready to leave the dock, we run out what we call a stern spring.

Q. You put it out?

A. We run out what we call a stern spring from the offshore side, on the ship, the after chock, run around the stern, and run it up half ways on the dock and heave it tight. After that is run, we let go everything, head line and stern lines and start very slow astern, in order to help the stern in towards the dock, to get the head to swing off, and we keep this line tight all the time to help the stern go up along the dock and get head on. That is the only line we had out swinging.

Q. About where is that cleat or cavel on the dock? How far towards the steel bridge from the usual place?

(Testimony of Captain A. C. Paulsen)

A. I don't know how long the dock is, but I should judge about 150 feet up the dock.

Q. How long is the Yucatan? A. 336 feet.

Q. You can guess then about where you took it up?

A. About where.

Q. Well, state what occurred now, Captain, at this time, in regard to the whistles and the bridge, and the whole story.

A. When I got ready to leave the dock, we had our lines run, and I gave the signal for the bridge to open; let go all lines.

Mr. EVANS: Would the Court be willing to go down with the stenographer while the Captain is giving his testimony on board the ship, and let him describe on the premises there just what was there at that time, or do you feel you can get a clear enough understanding. We will be glad to furnish the conveyances, if the Court feels it is worth the time.

COURT: I will leave that to counsel. Mr. Reed says he is very anxious to get through with this witness before six o'clock.

Mr. REED: I will be very glad to have that done, but the Court can look at the boat at any time.

COURT: He can show from here.

WITNESS: I can illustrate from the model (arranging blocks). That is the position the ship would be in when tied up to the dock; laying alongside of the dock, we have a line out from this quarter in here.

COURT: A stern line.

A. And another short line from here and in here,—

(Testimony of Captain A. C. Paulsen)

either way we can get hold of the dock—what we call our stern lines. Ahead here, we have a line from here, leading down this way, another line leading up this way, our head line. When we get ready to leave, we run our stern spring from our offshore quarter.

COURT: That is on the starboard side of the boat.

A. That is on the starboard side of the boat, sir, up as far on the dock as we can, just about midships, I should judge about 150 feet, and heave this well tight on the capstan, steam capstan on the deck.

Mr. EVANS: Explain that to the Court.

A. After it comes over or comes aboard the steam capstan, and it is held tight, and when that is held tight, we let go everything, stern lines and head line all together, and go very slow on the engines, and that brings the stern in towards the dock, say, about this way, and at the same time we heave on our stern spring. That will bring the stern up this way—up this way. We let go all our lines except that spring, and when the ship was about this far, I blew the first time for the bridge.

Q. How far out was that?

A. About 20 degrees, something like that. The bridge didn't open that time. I didn't pay much attention to it. I thought it would open when it got ready; and we kept on going at the same or swinging turn, until the ship was about 80 or 90 degrees,

(Testimony of Captain A. C. Paulsen)

and I blew the second time for the bridge, the ship still swinging with the current and the wind, and still heaving on this line. When she came down this way, so we couldn't use our line any more, and just about here would be a proper time to let go, about 120 degrees, 110 or 120 degrees, which would have been the proper time to let go, but the bridge wasn't open, when I blew the danger signal, and a very short time after I blew the danger signal, the bridge commenced to open, and I gave a bell for full ahead, full speed ahead, the current setting down this way, and the wind setting down this way both kind of got the ship out in a postion like this, and before we could get sufficient headway on her to clear her, we went ahead full speed on port helm, as we call it, in order to swing the stern out to clear the Boston here. The gun scraped for about 30 feet or 25 feet on the Yucatan's side, as she swung out there, with the helm aport. And coming this way, our after boom that he spoke about, we have a guy; here is our boom; this boom being on the offshore side—that would be the offshore side—is never over the side of the vessel—is never over the vessel's side. Swinging here we had a guy on her midships, and another guy extending out here, made fast to an eye bolt here, right at the ship's line, extending out three or four inches, something like that, swinging around this way, and going ahead, the corner gun caught in this guy on the outside part of the guy, rather this inside guy, and caused the boom to swing out,

(Testimony of Captain A. C. Paulsen)

and the hook caught in the canopy of the steam launch.

Q. Captain, I will show you Claimant's Exhibit 4 and ask you which cargo boom it was on there that did that? Identify it.

A. This after one.

Q. The most aft of all?

A. The most aft of all here.

Mr REED: I want to offer in evidence the monthly meteorological report of Mr. Beall's. Mr. Beall is out of town. This shows the direction of the wind and the height of the river that day. Here is the wind northwest.

Marked "Claimant's Exhibit 5."

Mr REED: I offer it in evidence to show the stage of the water. It shows ten feet above zero—and the general direction of the wind during the month.

Q. Now, Captain which way was the wind on the 3rd of March?

A. About southeast.

Q. Was there any wind that day?

A. Oh, about 15 miles.

Q. What happened to the Yucatan from the contact with the gun?

A. Why, we tore two plates and bent two frames, tore out four dead eyes, and dented two more.

Q. Do you know what the approximate cost of reapiring it will be?

(Testimony of Captain A. C. Paulsen)

A. Well, I had a bid from the Iron Works in Portland here. They estimated it would cost $3200.

Q. $3200.00? A. Yes.

Q. When did you do that?

A. A short time ago.

Q. When? A. Yesterday.

Q. Did the men go up there and look at the boat?

A. Yes, sir.

Q. From the Willamette Iron Works?

A. Portland Iron Works.

Q. Portland Iron Works. Well, there were three plates. Were there three or four plates taken out, cracked?

A. Two plates were cracked, and two plates were dented.

Q. Now, Captain, I want to get right on this. As I explained to the Court, I don't know much about that damage business. I thought we figured it $1200. Did he come up and investigate this? Who was it did it?

A. I sent for him to come down and give me an estimate of the cost of it.

Q. Do you know his name?

A. No, I don't know his name. I have a letter here to show.

Q. Well, I may have to amend our libel in that matter a little later.

A. I have another estimate from San Francisco, and I sent a wire down to telegraph me the particulars and – – –

(Testimony of Captain A. C. Paulsen)

Q. I don't know that they want you to tell what your boss said.

Mr. EVANS: It seems to me all this testimony about what somebody told him it would cost to rebuild this ship over again is incompetent. If these men were here to testify, of course it might have some value, but statements of this kind don't seem to me to be of much value.

CROSS EXAMINATION

Questions by Mr. EVANS:

Has the vessel been repaired?

A. No, sir.

Q. You haven't spent anything on it?

A. No, sir.

Q. Didn't consider the damage was sufficiently serious to warrant it?

A. It was repaired temporarily.

Q. What has been your custom, if you have a custom, in casting off when you are headed upstream? above any of these bridges through which you want to pass? Do you whistle before you start your engines going?

A. Yes, sir; the harbor regulations call for that.

Q. What is the whistle for the Broadway Bridge?

A. One long whistle, or blast of the whistle about six seconds, and a short whistle and a long whistle.

Q. That is, one, one, one? A. Yes, sir.

Q. A long and a short and a long?

(Testimony of Captain A. C. Paulsen)

A. Yes, sir.

Q. Could that be mistaken for any other signal a vessel would be giving in port? A. No, sir.

Q. Has it ever happened that the bridges would not respond to the first signal? A. Very often.

Q. Very often? A. Yes, sir.

Q. And when you gave the second whistle, you were still, as I understand it, fastened with the spring line. A. Yes, sir.

Q. To the dock. And at the time you gave the danger signal, you still were?

A. Still had a line on the dock.

Q. Still on the dock? A. Yes, sir.

Q. The object of giving the danger signal was what?

A. Why, to notify the people on the bridge that - -

Q. You were whislting for that bridge?

A. Yes, that we had to give it right away.

Q. What would have happened had you held taut your sternline without scating off?

A. We would have swung in alongside the Boston; that is what I figured on at the time. If a merchant ship had been laying there at the dock, I would have hung onto my stern line, and swung right up against them, but the Boston had guns protruding out there at right angles from the ship's side, and I was kind of afraid of them; but in any case that was the only thing to do, to hang onto the stern line.

Q. And that is what you did do until you got

(Testimony of Captain A. C. Paulsen)

to where you thought you were in danger of colliding with the Boston?

A. I still hung onto the stern line until I saw the bridge commence to open, and I could see I had a chance to go full ahead with the ship, and get away from the Boston on a port helm, as I explained.

Q. So you then started for the opening?

A. For the draw, yes.

Q. But you found you hadn't enough headway to carry you out in the stream and through the draw?

A. Yes, we had enough headway; had enough headway to carry us through the darw. We got through the draw all right. The only thing we scraped the ship's side with that particular gun on the Boston.

Q. By that time you had swung around until you scraped the gun?

A. We hadn't swung around, but the quarter was just scraping; in order to have the quarter scraping—suppose the Boston was in this position (illustrating) The ship must be like this; otherwise I couldn't go ahead on port helm.

Q. Do you know whether you had begun to scrape before or after you cast off your spring line?

A. The ship couldn't scrape before after I cast off because the ship was held up by the spring line.

Q. Before you cast off? A. Yes, sir.

Q. And then you cast off, I take it, when the vessel rebounded from the concussion?

(Testimony of Captain A. C. Paulsen)

A. No. I told you we had cast off. After the vessel had struck the Boston, you mean to say?

Q. Yes.

A. No, sir, I didn't tell you so.

Q. (Read) Do you know whether you had begun to scrape before or after you cast off your spring line? A. (Read) Well, the ship couldn't scrape before after I cast off, because the ship was held up by the spring line.

Q. Well, wasn't the vessel long enough to reach from the cleat, or whatever you were fastened to by the spring line to the Boston? A. Yes, sir.

Q. So it could have done that, couldn't it?

A. Not unless the ship swung around right angles with the Boston. At the angle we were laying it could never happen.

Q. You mean at right angles to the gun?

A. No, I mean at right angles to the Boston. The gun was sticking out at right angles from the Boston's side, and in order to touch the Boston at all, with the stern line fast, we had to swing in the same position as the Boston.

Q. And that is what you would have done, had it been a merchant vessel, rather than cast off your stern line, unless the draw had been open sufficiently for you to go through?

A. No, if a merchant ship had laid in place of the Boston there, nothing would have happened; clear sides like the side of my own ship; not a thing to touch.

(Testimony of Captain A. C. Paulsen)

Q. The point is, if you hadn't seen the draw open, you would have kept close with the stern line and swung inside by the other vessel, and nothing would have happened except the little 'bump?

A. Come together.

Q. At what angle were you when you cast off your spring line, Captain Paulsen, as near as you recollect?

A. About 120 degrees. 90 degrees would be pointing right across the river.

Q. Would be right angles – – –

A. And just about 30 degrees more.

Q. And how soon after that was it that you struck the Boston, after you cast off?

A. Well, it must have been a matter of seconds.

Q. A matter of seconds? A. Yes.

Q. A very short time?

A. A very short time; I couldn't say very much about the time there, because I was pretty busy looking after the ship.

CROSS EXAMINATION

Questions by Mr. MAURY:

Captain Paulsen, did you say that after you cast off your head line, you waited about five minutes before you started to turn the boat around?

A. No.

Q. What did you say about five minutes?

A. I didn't say anything about five minutes.

(Testimony of Captain A. C. Paulsen)

I was telling you just about five minutes before we got ready to depart from the dock.

Q. Then you cast off the head lines?

A. No, no, before we touched any line at all, we run out our stern spring.

Q. You run out your spring?

A. Yes, we always do that with a vessel made fast to the dock with stern lines and head lines.

Q. How soon did you cast off before you actually started to turn?

A. I blow the whistle first for the bridge; then we let go our lines, and the ship started in to swing.

Q. That was what I was trying to bring out. You did blow a whistle? A. Yes.

Q. Before you ever started to turn at all, didn't you?

A. Yes, sir; of course, comes out from the dock a little bit before get any headway in turning at all.

Q. Didn't you blow one whistle before you ever started to turn at all? Didn't you blow one whistle for the Broadway Bridge?

A. Before we ever let go the lines?

Q. Before you ever started to turn at all, didn't you blow one signal for the Broadway Bridge?

A. No, the first whistle I blew for the Broadway Bridge was about 20 degrees off the dock.

Q. Do you remember testifying down on the steamship Boston at the time of the investigation?

A. Do I remember testifying then?

Q. You testified then? A. Yes, sir.

(Testimony of Captain A. C. Paulsen)

Q. In the presence of Captain Blair and Mr. Beckwith? A. Yes, sir.

Q. Didn't you testify down there like this, in effect? We left the Globe Milling Company's dock at 12 o'clock noon, the 3rd of March, 1914. I blew for the Broadway Bridge to open? A. Yes, sir.

Q. "At 12 o'clock, the same time, we let go the head lines in order to swing the ship around, hanging onto our stern line; Later, the ship being about 20 degrees off the dock, I blew the second whistle for the bridge to open, but no attention was paid from the bridge". Now, that is what you testified down there, wasn't it? That the whistle you gave, when you were 20 degrees off the dock, was the second whistle?

A. The only whistle 20 degrees off the dock – – –

Q. Just answer the question, Captain Paulsen. What do you think about that? Was that testimony correct? Did you give that testimony there?

A. I gave the testimony; that is, if it is on the paper, it must be the way; I don't recall.

Q. That the whistle you gave the second time, the second signal you gave for the Broadway Bridge was given when you were about 20 degrees off the dock?

A. That is the first whistle.

Q. I just want to know whether you testified at the hearing in this particular way? Now, answer this yes or no, please. Just this one question: "Later the ship being about 20 degrees off the dock, I blew

(Testimony of Captain A. C. Paulsen)

the second whistle for the bridge to open." Now, did you testify that way or not?

A. Oh, I testified, I suppose.

Q. You testified to that?

A. Yes, but that is the wrong idea altogether.

Q. You mean to say now it is wrong?

A. I believe it is, because the ship being 20 degrees off the dock, it is just hardly clear of the dock, you see.

Q. You remember testifying to that, do you?

A. Yes, I remember testifying.

Q. But you were wrong then, and right now?

A. Well, if I said that way, you know; I couldn't say that.

Mr. MAURY: Now, if the Court please, the question I read was in substance and effect. I would like to get this into the record, the questions and answers: "Q. Just what time did your clock say that you blew for the Broadway Bridge? A. Twelve o'clock we let go of the head lines, in order to swing the ship around, hanging on to our stern line. Q. Then tell what happened? A. The ship being about 20 degrees off the dock, I blew the second whistle for the bridge to open, but no attention was paid from the bridge." Now, did you give that testimony?

A. I did.

Questions by Mr. BECKWITH:

How many times did you take the Yucatan away from that dock prior to this accident?

(Testimony of Captain A. C. Paulsen)

A. How many times?

Q. That is, about how many times, yes.

A. I couldn't answer that off-hand.

Q. Five or six times?

A. About that, I guess.

Q. Did you ever have trouble with the bridge opening? Was it slow to open before?

A. Yes, we had trouble more or less often.

Q. That bridge was always having trouble?

A. Always opened, though. We never had any trouble like this particular time.

Q. Was it ever slow in opening?

A. Not particularly slow, but it could have been attended to more promptly.

Q. What trouble did you have? Just tell what trouble you had with the bridge?

Mr. EVANS: Does that refer to this particular time?

A. At this particular time?

Q. No, prior to this.

A. I have nothing to say about that.

Q. You say, prior to this accident, you had been around there, you had taken the Yucatan away from this Globe dock five or six times? A. Yes, sir.

Q. And you said the bridge was slow in opening?

A. Yes, sir.

Q. You had some trouble that way?

A. Never had any trouble with her.

Q. Had always been a little slow, hadn't it?

(Testimony of Captain A. C. Paulsen)

A. I couldn't testify to anything of that kind, you know, except in this particular case.

Q. But after this, you know, a few times after that accident happened, you always used the tow boat, didn't you?

A. No, once in a great while, when we are working the engines, we use a tow boat. I don't believe we had a tow boat in this harbor more than three or four times.

Q. But when the current is as strong as that, setting into the dock, didn't you use a tow boat even if you had your own steam? A. When?

Q. The next trip after that, for instance.

A. I don't know whether we used a tow boat or not. I know we went up there once, I believe, with a tow boat.

Q. Now, this hearing that you had down at the Custom House. You received written notice of that, didn't you, of the findings? A. Yes.

Q. And do you remember that the letter said from the evidence adduced at your trial on the charge of negligence, filed against you on this April 11, 1914, the charge has been sustained? A. Yes.

Q. That was the substance of the letter you got?

A. Yes.

Q. You had no pilot's license in the Willamette River at that time?

A. No Pilot's license in the Portland harbor, not the Willamette River.

Q. You knew that the law required a pilot?

(Testimony of Captain A. C. Paulsen)

A. Yes.

Q. In moving your ship from dock to dock?

A. Yes.

Q. What was the charge? The pilot's charge?

A. No charge whatever.

Q. Didn't they charge you $7.50 for moving the ship? A. No, sir.

Q. Now, you had trouble before this accident with the Yucatan? Do you remember an instance down in San Pedro Harbor? A. When?

Q. On January 28, 1914? A. San Pedro?

Q. San Pedro? A. No, sir.

Q. San Diego Harbor? A. Yes, sir.

Q. What happened there?

A. Why, we grounded the ship in San Diego Harbor.

Q. You ran her aground?

A. Was only 20 minutes or so; early in the morning; foggy weather.

Q. And the inspectors, the Custom House people there, had a charge against you, found a charge of negligence, didn't they?

A. No, didn't file anything. I filed my report, you know, like we always do, in detail, told them what happened, everything of the kind, how long the ship was on the mud, about 20 minutes. We backed off again, and no one knew anything about it. We had a trial, because they thought we should have stayed in outside until later on in the day.

(Testimony of Captain A. C. Paulsen)

Q. That happened January 28, 1914, in San Diego Harbor? A. About that time.

Q. What was the result of that trial?

A. I got suspended for 60 days.

Q. Suspended for 60 days? A. Yes.

Q. So in fact your license was suspended for 60 days from the period—from and after June 16, 1914?

A. Something like that; I know it went along six months before we had a trial about that case.

Q. The accident happened before this collision?

A. Yes, sir.

Q. And your trial, your findings and trial was afterwards?

A. That was a considerable time afterwards, about five or six months afterward, I guess.

Q. About how far up the dock was the stern of the Yucatan, when you let go of your line, your stern line? A. How far up the dock?

Q. Yes. That is, from the north corner of the dock.

A. From the north corner of the dock?

Q. Yes, was it 100 feet? A. No.

Q. You said that you hooked on to this cleat 150 feet up? A. Yes.

Q. Was it clear up to that cleat?

A. The stern?

Q. Yes.

A. I told you I carried that line up amidships about 150 feet up the dock.

(Testimony of Captain A. C. Paulsen)

Q. That is, you mean from the north corner of the dock 150 feet south

A. Yes, about that.

Q. Now, when you hauled her around, you had your starboard quarter to the dock?

A. No. We had our port quarter to the dock hauling around.

Q. I mean when clear around.

A. When clear around, starboard quarter to the dock.

Q. How far from that 150 foot point was the extreme stern of the Yucatan when you let go? Was it pretty near to that cleat?

A. As far as I recall, it must have been—well, we used to let off up about 20 feet from the cleat, north of the cleat.

Q. Didn't the current have a tendency to send the ship down when she got broadside?

A. Yes, sir.

Q. So her stern wouldn't be clear up to the cleat, would it? A. No.

Q. Was the Yucatan a loaded ship?

A. No, light.

Q. She was light, wasn't she? A. Yes.

Q. Hadn't you taken aboard part of your cargo from that dock?

A. About 200 tons, something like that; I don't remember exactly.

Q. Where would you stow that?

A. In the hold.

(Testimony of Captain A. C. Paulsen)

Q. Wasn't she loaded pretty heavy aft?

A. No.

Q. She wasn't loaded heavy aft?

A. No, sir; this was our first call at a loading dock after we got through discharging our northbound cargo.

Q. You put it in the hold?

A. Put it in the hold.

Q. That would be way up forward, wouldn't it?

A. No.

Q. About where would it be, then?

A. We were working three gangs in there; we distributed it evenly all over the ship.

Q. Well, the Yucatan was 337 feet long, and if she was 130 feet up the dock, the last 130 feet of the Yucatan would touch the dock, wouldn't it, if you hung on? It would have touched the dock, wouldn't it? A. Yes.

REDIRECT EXAMINATION

Questions by Mr. REED:

State whether or not there was a light burning there in San Diego on this buoy, when the boat went on the mud.

A. No the light was out of commision.

Q. What light? A. The gas buoy.

Q. Was there any red flag, or red ball displayed from the bridge, when the bridge didn't open?

A. No.

(Testimony of Captain A. C. Paulsen)

Q. Do you know how long you claim it was between the time of the first signal, and the time of the bridge opening?

A. About 15 minutes.

Mr. REED: We want to introduce, if the Court pleases, the United States regulation in regard to the handling of bridges.

Mr. EVANS: May it please the Court, as I recollect the statute, it requires that these regulations be promulgated by the Secretary of War, and these are signed by John C. Scofield, Assistant and Chief Clerk to the Secretary of War. It is a delegation of authority to an official, and I question whether it can be redelagated to any under official.

COURT: Put it in the record, the statute defines the duties of the operator of the bridge.

Marked "Claimant's Exhibit 6".

Mr REED: I don't think so; I think it is a matter of regulation.

COURT: Don't the statute require them to open promptly?

Mr. REED: Yes, I know; but this is the one that provides that, and it is signed by the Assistant and Chief Clerk to the Secretary of War.

Mr. Evans: I make the further objection it is required, before they become official regulations, that they be posted in three different places. There is no proof that has been done. I have always ques-

tioned, and question now, whether we have any valid legal regulations in this harbor, covering the movements.

Mr. REED: I ask to amend my amended answer, and plead custom and usage.

Q. Now, Captain, what is the custom and usage in the City of Portland, as to the action of the bridge when a boat whistles for it, as to its opening? What is it supposed to do, according to custom and usage? Do you know the custom here and the usage?

A. Yes, sir.

Q. What is it?

A. Well, passing a bridge, we usually – – –

Mr. EVANS: I object to that, because that is a matter which must be regulated by statute.

COURT: I think the Federal statute makes it a crime not to open a bridge promptly when called for.

Mr. EVANS: But before there can be any crime, there must be a regulation saying when that must be opened, and that regulation must be promulgated by the Secretary of War, in the manner provided by statute, and that I claim has never been done, with reference to a regulation in Portland.

COURT: Isn't it a crime not to open? Isn't it prescribed by statute?

Mr. EVANS: Not to open when the signal is given, the signal as prescribed by the Secretary of

(Testimony of Captain A. C. Paulsen)

War under authority delegated to him. The Secretary of War has never done that. If this regulation is what it purports to be, but the Chief Clerk in the Secretary's office has undertaken to do it. It is a matter that has been up to that Department before, and they should have regulations some time ago, but I don't desire to take any particular advantage of Mr. Reed. I make the objection formally.

Mr. REED: You didn't withdraw the objection. The objection is there. Either withdraw it, or make it.

COURT: It is in the record.

Mr. REED: There are two objections—one, it is signed by the clerk, and the other it was not posted.

Mr. EVANS: No proof it has been.

Mr. REED: The objection isn't withdrawn, and I will have to go down here to Mr. Upson of the Engineer's Office to prove this. I, of course, never thought they would raise that. I will have to do it sooner or later, prove this is a regulation.

Mr. EVANS: I will withdraw it. I don't care to take that kind of advantage of Mr. Reed under the situation. I do think it is a matter the War Department should straighten out.

Mr. REED: Now, if the Court please, I want to offer in evidence, City Ordinance No. 18078, Sections 2 and 6.

Mr. BECKWITH: No objection.

Marked "Claimant's Exhibit 7."

(Testimony of Captain A. C. Paulsen)

RECROSS EXAMINATION

Questions by Mr. EVANS:

May I ask you another question, please? I understood you to say something about the wind. How was the wind this day, if you recollect?

A. Southeast.

Q. Strong or not? A. 15 miles.

Q. Well, I don't know, and the Court don't know, whether that is a strong wind in the harbor or not.

A. Well, 15 miles would be pretty hard to explain, except you know the scale of measuring wind by but 15 miles is not what is called a strong breeze, but just enough to make you feel there is a wind.

Q. Help to carry the boat around, would it?

A. To a certain extent, yes.

Q. And from Mr. Beckwith's question, it would appear that had you held on to your stern line, you would have landed up against the dock, against the Boston, because you were drawn up there to within twenty feet of the cleat? A. Yes, sir.

Q. And your vessel then would have lined up, would it not, against the dock in such a manner, because the dock runs off at an angle? In such a manner, it wouldn't have struck the Boston. Here is the angle I refer to.

A. The ship was hitched up by the stern line. She would have got considerable headway swinging around. Would throw her up against the Boston when coming down here. She would have got con-

(Testimony of Captain A. C. Paulsen)

siderable headway on her, and 130 feet here, she sure would overlap the Boston that much.

Q. But she was fastened 150 feet up the dock.

A. And she was within 20 feet of that.

Q. That would be 130 feet of the dock?

A. About that.

Q. Then 130 feet of your vessel – – –

A. Would take the dock. The rest would lay over here.

Q. How long is the dock? A. I don't know.

Q. The dock is longer than your vessel?

A. This part of the dock from here to there is not in use. It is a kind of a corner affair coming in here, not used for anything. Here is what you call the extreme end of the dock.

Q. Your vessel laying 130 feet across the dock, there would be a fulcrum, and would have saved the boat. A. No, I don't think so.

Q. You could, I say, if fastened here?

A. Well, I fastened her, you must remember, with a line from this quarter; would have caused the ship to swing clean around, with the headway she would have had on her would have gone right in, for the current set right in here on the Boston.

Questions by Mr. BECKWITH:

If the Boston hadn't have been there, she would have hit the beach?

A. No, I don't think would have hit the beach. The Boston is considerably away from the beach, you know.

(Testimony of Captain A. C. Paulsen)

REDIRECT EXAMINATION

Questions by Mr. REED:

Captain, what was done with the plates?

A. Temporarily repaired.

Q. What was done to remporarily repair? Have they been repaired?

A. Temporarily.

Q. You said they hadn't been repaired, though.

A. I said were temporarily repaired. We got a temporary repair job on it.

Q. What have you done? Have you taken the plates out? A. No.

Q. What have you done?

A. We patched them.

Q. You patched the side of the boat there, for a distance of how many feet?

A. Fifteen.

Q. You put wooden plates on, haven't you, and bolted them inside and out? A. Yes, sir.

Q. Covered these plates with wooden covers?

A. Yes, sir.

RECROSS EXAMINATION

Questions by Mr. EVANS:

I understand you to say, when you cast off, the draw was opening? A. Yes.

Q. And that you cast off when you were about 123 degrees?

(Testimony of J. Newmarker)

A. 120 or 123 degrees. Between 120 and 130 degrees.

Witness excused.

J. NEWMARKER

A witness called on behalf of the Claimant, being first duly sworn, testified as follows.

DIRECT EXAMINATION

Questions by Mr. REED:

What is your occupation?

A. Marine engineer.

Q. What is your present position?

A. Chief engineer of the Yucatan.

Q. Were you on her when this accident took place?

A. Yes, sir.

Q. Were you running the engines that day?

A. Sir?

Q. Were the engines in use that day?

A. Yes, sir.

Q. Was she under her own steam that day?

A. Yes, sir.

Q. And how much steam?

A. Well, we had 130 pounds.

Q. And where were you when this scraping took place?

A. When the first bell came from the engine room, I was in the engine room at the time. I had a water tender working on the pipes, and I went in the fidley. When I heard the danger whistle, I looked out, and

(Testimony of J. Newmarker)

as I looked out, the port, then was when the Boston's gun came in. It struck on the dead light, and kept running aft, and broke four dead lights. At that time, the ship swung off a little bit, and she cut the guy from the after boom, and I seen that come, and while we looked out agin, why, we seen the top of the steam launch, or some boat, I think it is the steam launch.

Q. It was that boom that—the hook of the boom, caught the steam launch?

A. Yes, the mouth of the gun carried away the eye bolt on the side of the ship, and broke through the side, sir.

Q. And loosened the cargo boom.

A. Yes, the boom swung.

Q. And it was that that caught the canopy of the steam launch? A. Yes, sir.

Q. On the Boston. Have you ever gone up to the Globe dock with a tow boat, when there was steam upon the Yucatan?

A. Well, we have steam up, yes, sir, but the donkey boiler, if working on the main engines, would use a tow boat.

CROSS EXAMINATION

Questions by Mr. BECKWITH:

Chief, how far below the deck of the Yucatan, are those dead lights situated? How many feet?

A. Well, we will say—from what deck?

Q. That is your top deck.

(Testimony of F. B. Wright)

A. The boat deck? About 2 1-2 feet, something like that.

Q. Are those dead lights used to let light into the staterooms, or the compartment?

A. At the present time, it is the saloon, the dining room.

Q. Now, where was your eye bolt located, to which this boom guy was attached?

A. Well, that is – – –

Mr. REED: You can see in the photograph there.

A. Probably right abeam of the mast, and maybe eight inches from what I call the—well, the top of the deck; I don't know what they call it.

Q. Top of the deck? A. Yes, sir.

Q. How could that gun, while ripping these dead lights out, also catch that guy?

A. As it left the last dead light, the gun slid up the side of the ship; the mark is still on her. I think you can see there in the photograph.

Witness excused.

F. B. WRIGHT

A witness called on behalf of the Claimant, being first duly sworn, testified as follows.

DIRECT EXAMINATION

Questions by Mr. REED:

Please state your occupation?

A. Chief Clerk.

Q. Where?

(Testimony of F. B. Wright)

A. Ainsworth Dock, San Francisco and Portland Steamship Company.

Q. Where is that with regard to the Globe Dock?

A. Almost directly across the river.

Q. Do you know how wide the river is there?

A. In the neighborhood of 800 feet.

Q. On the 3rd of March, did you see anything of this occurrence we are talking about?

A. Well, I saw the latter part of the collision.

Q. Please tell the Court about it.

A. I happened to be in the office at the time, and I heard the Yucatan whistle for the Burnside Bridge—the Broadway Bridge, I should say—two times, and shortly afterwards, a danger whistle. Immediately I heard the danger whistle, I naturally ran out to the face of our dock to see what the trouble was, inasmuch as I had heard the two whistles for the bridge before that, and when I got out on the face of the dock, why, the Yucatan's cargo fall, from where I could see it, was just raking the hood off the Boston's launch.

Q. What was doing on the bridge, the Broadway Bridge?

A. The bridge was closed at the time, and it opened, probably half a minute, or three quarters of a minute, after the hood had been taken off the Boston's launch.

Q. I understood you to say you went out when you hear the danger whistle? A. Yes.

(Testimony of F. B. Wright)

Q. Your office is right there on the edge of the dock, is it?

A. Our office is on the south end of the Ainsworth dock.

Q. I mean on the river side. You stepped out and took a look?

A. No, not on the river side; across the dock from the river.

Q. Is it inside?

A. Where the office is, is built out beyond the dock so we can see the river from the office.

Q. The bridge at that time you say was closed?

A. At the time I got to the face of the dock.

Q. And it immediately opened; it opened shortly?

A. It opened soon after I got out to the face of the dock.

CROSS EXAMINATION

Questions by Mr. MAURY:

What did you look at first when you came out there—the bridge?

A. I looked at the bridge.

Q. You looked at the bridge? A. Yes, sir.

Q. The boat had already struck, you say?

A. I imagine it had, because from where I could see, I couldn't see the gun which I understand she hit first.

Q. It was this danger signal that attracted your attention? A. Yes, sir.

Q. You heard Captain Paulsen say the danger

(Testimony of Captain H. L. Chase)

signal and the collision were almost simultaneous?

A. No; I just this minute came in the court room.

Q. But it was the danger signal that attracted your attention?

A. The danger signal—well, I heard two whistles for the bridge first.

Q. You never looked at the bridge until after the signal?

A. I couldn't see the bridge until after I ran to the face of the dock.

Q. That was after the danger signal?

A. Yes.

Witness excused.

CAPTAIN H. L. CHASE

A witness called on behalf of the Claimant, being first duly sworn, testified as follows.

DIRECT EXAMINATION

Questions by Mr. REED:

Captain Chase, state your occupation.

A. Steamboat captain.

Q. Of what boat? A. Cascades.

Q. Did you see this occurrence on the 3rd of March? A. Yes, sir.

Q. Please state to the court what you saw, and where you were.

A. I was just above the O R & N bridge, and I heard her blow for the bridge a couple of times, and he blew the danger signal, and it drew my attention,

(Testimony of Captain H. L. Chase)

and I looked down and saw her position. At that time the Broadway Bridge wasn't open yet. I don't know just what position he was in. I was above the bridge, and couldn't tell exactly, but he was headed around.

Q. Above the present O R & N bridge or the old one? A. The present one.

Q. Did you see the Broadway Bridge?

A. Yes, sir.

Q. Will you state to the Court whether it was open or not?

A. It was not open at the time he blew the danger signal.

Q. How long after that did it open?

A. I couldn't tell.

Q. Did you take a look?

A. I took a look to see. I heard her blowing for the bridge, and heard them blow the danger signal, and that drew my attention.

Q. The bridge was not open?

A. The bridge was not open.

Q. The Broadway Bridge?

A. The Broadway Bridge.

CROSS EXAMINATION

Questions by Mr. EVANS:

You don't know whether the captain had cast off when he blew the danger signal, or not?

A. No, I don't know whether had cast off her

(Testimony of Captain H. L. Chase)

stern spring, but saw as he was swung around, his lines were gone forward, and he was swinging; at what angle, I don't know.

Q. If the vessel had been handled properly, there was plenty of time after blowing the danger signal, at that position, for the draw to open.

A. Beg pardon?

Q. Suppose the draw had opened at the sounding of the danger signal; suppose they had begun to open then.

A. That hardly gives a person time then to get out, and get into position. They ought to open sooner, with the current of the river, and a big steamer, I should think.

Q. The testimony is, he had already signalled twice before that, according to his testimony.

A. Yes, sir.

Q. And there wouldn't be much question but what the men on the bridge would have it cleared to operate. Suppose the draw had started to raise immediately on hearing the danger signal, considering the position of that vessel, and the distance away, there would have been ample time to have got that bridge up so the boat could have got through.

A. That depends on the circumstances, how fast the bridge operates.

Q. Did it take as long to operate that bridge as usual, or longer?

A. Sometimes it takes longer than others. Sometimes they have trouble raising one side, and then

(Testimony of Captain H. L. Chase)

raise the other. Not always the same period in opening.

Mr. REED: Does the county claim you have to blow the danger signal to get the draw?

Mr. EVANS: Oh, no.

Q. You have never operated that bridge?

A. No, sir.

Q. You don't know anything about it?

A. No, sir.

Q. Are you a seafaring man? A. No, sir.

Q. Just operate - - - A. River boats.

Q. River boats.

Questions by Mr. BECKWITH:

Where was the Cascades lying?

A. This time laying at East Davis Street.

Q. Where were you?

A. I was on the Cascades.

Q. Where you saw from there?

A. Very plainly.

Q. East Davis? A. East Davis.

Q. Do you remember any other ships on the west side of the river at that time?

A. On the west side?

Q. Yes.

A. You mean which part of the west side? Which part of the river?

Q. Right opposite.

A. Directly opposite to where I was?

Q. The Yucatan. A. No, I couldn't see.

(Testimony of Captain Julius Allyn)

Q. At the time—do you remember the dredge there that lay there so long? The Chinook, I think it was.

A. She was lying there about that time.

Q. Do you remember the dredge tied up there, tied to this dolphin there?

A. Yes, she was there all winter, four or five months. She lay at the Alaska dock, just above the Ainsworth dock.

Witness excused.

JULIUS ALLYN

A witness called on behalf of the Claimant, being first duly sworn, testified as follows.

DIRECT EXAMINATION

Questions by Mr. REED:

Captain, please state your occupation.

A. Columbia River and Willamette River Pilot.

Q. At the present time? A. Yes, sir.

Q. Do you have a license for the Columbia River?

A. Yes, sir.

Q. And the Portland Harbor? A. Yes, sir.

Q. Were you in the court room here and heard Captain Paulsen's testimony, regarding leaving the Globe Milling dock with the Yucatan on the 3rd day of March? A. No, sir—you mean today?

Q. Yes. A. Yes, sir.

Q. Were you in a position to see the way he handled the models and the spring line?

(Testimony of Captain Julius Allyn)

A. Yes; I could see fairly well from where I was sitting.

Q. And your experience—how many years have you had here as a pilot?

A. Very close to nine years.

Q. And do you have charge of sea-going ships?

A. Yes, sir. That is, I mean for nine years.

Q. Have you ever handled the Yucatan?

A. Yes, sir, I have; not very often.

Q. State whether or not that handling of the Yucatan leaving the Globe Milling dock at that time was, to a man acquainted with the business, in a seamanlike and proper method.

A. Yes, sir.

Q. Or a negligent and careless method?

A. No, sir, was very proper.

CROSS EXAMINATION

Questions by Mr. EVANS:

The proper time to cast off is when the vessel is around at 120 degrees?

A. I wouldn't say the degrees, for if I am doing, I use my own judgment, as to the proper time to cast off.

Q. You were testifying he handled it properly, and that is what he testified to. When 120 degrees around there, so that is the proper time.

A. I would not say the degrees. I say I use my own judgment if I am doing it myself.

(Testimony of Captain Julius Allyn)

Q. But you were not testifying, when you say the captain handled it properly, about your own methods. You say he handled it properly.

A. He didn't say degrees. He said swinging on the stern line, and I said yes.

COURT: He said when he cast off he was about 120 degrees.

Mr. REED: The question isn't complete. He said the wind blowing 15 miles.

Mr. EVANS: He said he cast off at 120 degrees.

Mr. REED: And the wind blowing.

Mr. EVANS: Yes, I think he said the wind was blowing a little, and the draw was open at that time when he cast off. Now, if the vessel had been handled properly, he ought to have been able to make that turn if cast off at 120 degrees, ought she not?

A. That I couldn't say. 120 degrees; as I say, I use my own judgment.

Q. How are you able to say Captain Paulsen handled the vessel properly, when he cast off at 120 degrees?

A. The question put to me was if he cast off properly when swinging on the stern line.

Q. That is what you meant? A. Yes, sir.

Q. That is all you were testifying to?

A. Yes, sir; I wasn't testifying to angles and degrees, because I don't know anything about that; haven't any method of taking those when you are doing that kind of work.

(Testimony of Captain Julius Allyn)

Q. Was it proper for him to have been handling that vessel without a river pilot on board?

A. Yes; anybody can handle their own vessel that wants to.

Q. Don't you know that the law requires him to have a pilot on board?

A. I don't know anything about that.

Q. Why do they have you men employed, the Willamette River pilots, if it is proper for a captain who hasn't a license, to handle the vessel?

A. Well, it relieves the master of the vessel.

Q. You are tolerably interested to help Captain Paulsen here too aren't you?

A. Not necessarily.

Q. You river men don't like the fellows who tend these draws. They don't open promptly enough to suit you, do they?

A. No, they don't.

REDIRECT EXAMINATION

Questions by Mr. REED:

Isn't it a fact that many captains come to this port who have to have a harbor pilot, because they don't know the harbor? Or anything about it?

A. Yes, strangers.

Q. Isn't that a fact? That is the reason for the necessity for Portland Harbor pilots?

A. Yes. A stranger doesn't know one wharf from another.

(Testimony of Captain Julius Allyn)

Q. Isn't it a fact that any local captain, or local steamer that runs here, and is familiar with the harbor, but happens not to have got his license endorsed for the Portland Harbor, if he calls for a Columbia River Pilot, nevertheless the Columbia River Pilot does nothing, but the captain handles the ship?

A. Well, as a rule he does.

Q. Suppose Captain Paulsen would call you on the ship any time. He would still handle the ship, wouldn't he?

A. The rule has been the captain takes her away from the wharf, and then the pilot takes charge, as soon as clear of the wharf.

Q. I mean, as a matter of fact, the captains who know the harbor handle their own ship, and the call for the local pilots is from strangers that don't know the harbor?

A. Yes, sir; that is the general rule.

Mr. EVANS: The law fixes that. You better revise the statutes.

Mr. REED: I know. But there is another thing on this subject.

Q. All any captain who comes here frequently and knows the harbor and works his ship here, has to do, is to get his general license endorsed, isn't it?

A. Yes, sir.

Q. No examination or anything. Just as soon as he has been here, they endorse it for the local – – –

A. That of course, I don't know anything about.

(Testimony of Captain Julius Allyn)

That lays with the local Inspectors as to examinations and anything like that.

CROSS EXAMINATION

Questions by Mr. BECKWITH:

Suppose you were getting away from a dock, and there was a vessel lying just below you on about the same angle as the dock, her stern sticking out a little bit, was a heavy current setting in towards the dock this way, would you – – –

Mr. REED: Do you call two knots a heavy current?

Mr. BECKWITH: Yes.

Mr. REED: All right; go ahead.

Q. And you were getting away from this dock here, and the current along that dock was running in towards this other vessel, would you consider it proper to wait until you got within 120 degrees before you cast off?

A. Well, I wouldn't—as I said before, I wouldn't make any statement on degrees. I say I would use my own judgment in letting go.

Q. At that time.

A. Yes, myself. Of course, I don't know anything about the condition of the vessel that day.

Q. Isn't it the custom, Captain Allyn, to let go, when coming downstream, to get away from the dock, to let go within 90 degrees about broad off the dock? A. I won't say degrees.

(Testimony of Captain Julius Allyn)

Q. When about broad off the dock; isn't that the custom? Isn't that the best way to get away from the dock?

A. As I say, if I am doing it, I use my own judgment.

Q. What would your judgment be in a case like that?

A. Have to be according to wind and circumstances.

Q. Supposing a strong northwest wind blowing, and a two knot current coming downstream, and you were coming downstream?

A. Under those conditions, I probably—and at that rate—northwest wind and two knot current, I would probably let her go until she was headed pretty near for the Broadway Bridge before I would let go.

Q. If another vessel was lying below you, and the stream and the current setting in?

A. She must have sufficient power to clear the vessel.

Q. But wouldn't have headway in getting away from the dock.

A. Would have to have her own power, or wouldn't have headway.

Q. A single screw vessel wouldn't have any headway at all.

A. Wouldn't starting, but would pick up and steer as soon as you got started.

Witness excused.

(Testimony of J. S. Hicks)

J. S. HICKS

A witness called on behalf of the Claimant, being first duly sworn, testified as follows.

DIRECT EXAMINATION

Questions by Mr. REED:

Mr. Hicks, please state you occupation.

A. Foreman of the Broadway Bridge.

Q. When did you first become foreman of the Broadway Bridge?

A. When the bridge was open for operation, about the 20th of April.

Q. 20th of April? A. Yes, '13, 1913.

Q. What was your occupation previous to that?

A. I was on the Hawthorne Bridge from the time that opened until then.

Q. Well, as foreman—does the bridge foreman operate the draws?

A. Yes, we take a shift, the same as the rest.

Q. I mean they do operate at times and know about them? A. Yes.

Q. On the Broadway Bridge, how long will it take to clear the draw of traffic, on receiving a signal to open from a boat?

A. That depends on the – – –

Mr. EVANS: At what time of day?

Q. Any old time; the longest time, when crowded?

A. That depends on the traffic.

Q. All right; at the heaviest traffic.

(Testimony of J. S. Hicks)

A. Well, it will go from—oh, probably two or three minutes.

Q. Two to three minutes? A. Yes, sir.

Q. How long does it take to lift that draw by machinery?

A. Well, sir, it will take about one minute to raise; that is, after we start.

Q. After you get there, get your hands on the lever.

A. After it gets started. Of course, you can run slower than that.

Q. Run slower yes. Who was operating the bridge on March 3rd?

A. Well, I wasn't there. I couldn't say. I was out – – –

Q. Do you know a man named Smith that was gateman on the bridge, and then foreman?

A. Yes.

Q. Did you ever work on the bridge with him?

A. Yes.

Q. What was his occupation previous to working on the bridge?

A. I understand he was a blacksmith.

Q. How is that bridge operated—the Broadway bridge—by what power? A. Electric power.

Q. Did Smith know about electricity?

Mr. EVANS: I object as not competent, and improper.

COURT: Was he in charge of the bridge at the time?

(Testimony of Robert V. Smith and J. S. Hicks)

Mr. REED: I haven't proved that yet. That is the man; I haven't proved it. I suppose you will admit Smith was in charge of the bridge at the time, will you?

Mr. EVANS: Smith was on the bridge. I am not sure who was in charge.

Mr. REED: All right. (To witness) Get off.

Witness excused.

ROBERT V. SMITH

A witness called on behalf of the Claimant, being first duly sworn, testified as follows.

DIRECT EXAMINATION

Questions by Mr. REED:

Mr. Smith, I believe that you were working on the Broadway Bridge on the 3rd of March?

A. Yes, sir.

Q. Were you operating the bridge when this Yucatan business came up?

A. I was.

Witness excused.

J. S. HICKS

Recalled by the Claimant.

DIRECT EXAMINATION

Questions by Mr. REED:

Do you know Mr. Smith, who just testified?

A. Yes, sir.

(Testimony of J. S. Hicks)

Q. Was he working on the Broadway Bridge when you were? A. Yes, sir.

Q. In what capacity?

A. Well, he was gate tender when the bridge first opened for operation, and then he was put in as an operator; that is, broke in as an operator.

Q. Who broke him in as an operator?

A. There was two of us. I helped do it.

Q. You helped do it? A. Yes, sir.

Q. At that time did he know anything about electricity? A. No, sir.

Q. Was he able to handle the electric appliances in the case of the blow-out of a fuse, or a matter of that kind?

A. Well, he didn't seem to be.

Q. Well, did he, though? A. He did not.

Mr EVANS: Do you claim a blow out on the bridge? A fuse blown, or do you claim that? You haven't alleged anything like that in your libel.

Mr. REED: Do you claim it?

Mr. EVANS: No.

Mr. REED: Then I don't either.

Mr EVANS: Then why the proof?

Mr. REED: I want to show he didn't know how to put in a fuse.

Mr. EVANS: Why?

Mr. REED: To show he was incompetent.

Mr. EVANS: You don't allege that.

(Testimony of J. S. Hicks)

Mr. REED: I think I do allege it and allege it pretty hard. We will go and look.

COURT: Go ahead and put in your case. I don't see what this has to do with the case.

Mr. EVANS: You can put in a fuse yourself.

Mr. REED: That is more than Smith could do.

Q. Now, then, do you know Mr. Holman, one of the County Commisinoers? A. Yes, sir.

Q. I will ask you to state whether or not—in the first place, Mr. Smith was relieved down there on the 31st of March, wasn't he, shortly after that?

Mr. EVANS: I object as incompetent, irrelevant and immaterial.

COURT: I don't know what that has to do with this case.

Mr. REED: I want to show he was relieved for incompetency.

COURT: Well, if he was relieved for incompetency, and his incompetency delayed the opening of this bridge, that might be some material matter.

Mr. REED: A general incompetency would not?

COURT: General incompetency would not be sufficient, unless it affected the operation of th e bridge at that time.

Mr. REED: I mean incompetnecy in operating the bridge.

COURT: Very well.

(Testimony of J. S. Hicks)

A. He was relieved on the first of April; that is the 31st of March was his last day.

Q. State whether or not—do you know Mr. Holman, one of the County Commisioners?

A. I do.

Q. State whether or not Mr. Holman ever expressed to you any fact in regard to Mr. Smith's competency as a bridge operator?

Mr. EVANS: I object to that as incompetent, irrelevant and immaterial.

COURT: I think the objection is well taken on that. Mr. Holman's statement won't bind the county.

Q. I will ask you, then, who is it that employes and discharges the bridge employes?

A. Well, I guess the foreman at the present.

Q. What? A. The foreman at present.

Q. The foreman, yes; but at that time?

A. That was the bridge superintendent.

Q. The bridge superintendent? A. Yes.

Q. Was there a bridge superintendent on the 31st of March?

A. Well, he was let out just about that time, right along there. I don't know. The last week in March.

Q. At this time, then, who handled the employees on the bridge? A. Up to that time?

Q. At that time, and about the last of March?

A. Why, the superintendent; the superintendent of bridges and ferries.

(Testimony of J. S. Hicks)

CROSS EXAMINATION

Questions by Mr. EVANS:

Mr. Smith succeeded you on the bridge, did he not?

A. Yes, sir.

Q. You were let out, and he took your place?

A. Yes, sir.

Q. You haven't been very good friends since then?

A. Haven't seen the man since.

Q. Haven't been very friendly towards him, have you?

A. Have nothing agin him particularly.

Q. You don't like him, do you?

A. Well, I said I didn't have anything agin him.

Q. You don't like him, do you?

A. I don't care anything about him.

Q. When you testified he didn't know how to put in a fuse, you didn't mean that?

A. I meant incompetent.

Q. That is your opinion, but you said he didn't know how to put in a fuse over there. Do you mean to go on oath swearing Smith didn't know how to put a fuse in at the time this accident happened?

A. Did I say he didn't know how to put in a fuse?

Q. That is my recollection of the testimony.

A. That was the question put to me.

Mr. REED: You can answer. Go ahead and answer fully.

A. He didn't put in a fuse when one was out.

Mr. REED: Tell about it fully.

(Testimony of R. W. Orewiler)

A. Well, I wasn't on the bridge at the time.

Q. It isn't much of a trick to put in a fuse when it blows out, is it? A. No, sir.

Q. Anybody could do that, couldn't he?

A. He could, if he knows where to look for it.

Q. You showed him because you trained him?

A. I didn't show him. They had to send and get a man.

Q. I thought you trained him. Didn't you tell the Court you helped to drill this man so he would know how to operate the bridge? A. Yes, sir.

Q. You did your duty?

A. I did my duty while I was there, but this happened while I was away.

Witness excused.

R. W. OREWILER

A witness called on behalf of the Claimant, being first duly sworn, testified as follows.

DIRECT EXAMINATION

Questions by Mr. REED:

Please state your occupation, Mr. Orewiler.

A. Boiler maker, and ship repair man.

Q. Who are you with?

A. East Side Boiler Works.

Q. Did you examine this place on the Yucatan we are talking about? A. Yes, sir.

Q. What will it cost to repair that damage?

A. I estimate will cost about $3250.

(Testimony of J. Newmarker)

Q. Explain why it would.

A. There is about five plates to come off there, five feet wide, and probably 60 feet long. The total amount of that—each plate is about five feet by fourteen feet, and those are all put on with counter sunk ritets. Then a lot of ribs, reverse bars and beams and bead iron to come off, and a whole lot of carpenter work will have to be removed, rooms there, ship's quarters.

CROSS EXAMINATION

Questions by Mr. EVANS:

When was this examination made?

A. Why, day before yesterday.

Mr. EVANS: I move to strike, as incompetent, irrelevant and immaterial. You can't tell how much damage was caused by wear and tear of the vessel at sea since then. They must have had a survey of the boat made at the time of this accident, and they ought to call testimony and show it.

COURT: No evidence the ship is in the same condition now as it was after this accident.

Witness excused.

J. NEWMARKER

Recalled by the Claimant

DIRECT EXAMINATION

Questions by Mr. REED:

Mr. Newmarker, I believe you put the wooden plates on these places where the gun hit?

(Testimony of J. Newmarker)

A. Yes, sir.

Q. And please state to the Court what the condition of the boat was day before yesterday, as compared with what it was right after this accident? Has there been any further accident or disruption of the carpenter work, etc.?

A. No. All we have done to it is to put these two planks on the outside, and fix up the inside of the saloon there, the carpenter work.

Q. I mean has there been any further damage occurred since this accident?

A. Nothing at all.

Q. When a man examines that today for an estimate, is it in the same condition it was the 3rd of March? A. Yes, sir.

Q. After the accident.

A. Except some new paint on it; that is all the difference.

Q. You have painted it; that is all?

A. Yes, sir.

Witness excused.

Mr. REED: That is our case.

CLAIMANT RESTS.

Mr. REED: Mr. Beckwith; I suppose there is no replication to be filed by you, and the answer of the county had been filed. I don't know just what order the County should submit its testimony.

COURT: If the Libellant has any rebutting testimony, put it in.

(Testimony of H. H. Hilton)

H. H. HILTON

Recalled by the Libellant in rebuttal.

DIRECT EXAMINATION

Questions by Mr. BECKWITH:

Do you know the tonnage of the Boston?

A. No, sir, not off-hand. Something like 3000 tons.

Q. About what is it?

A. I believe Captain Paulsen said—what is the Yucatan's tonnage, Captain Paulsen?

Captain Paulsen: 3500 gross.

Q. Now, what is the distance of this corner of the dock which is on an angle to the Globe Milling dock? The length?

A. The distance of the little angle which turns in towards the shore on the north side of the dock is 40 feet.

Q. And if it were 70 feet—I believe you testified it was 70 feet, didn't you, this morning, from the bow of the Boston to the nearest point of the dock?

A. When the collision occurred?

Q. Yes. A. Yes, sir.

Q. If this Yucatan was up the dock 130 feet, it would include 42 feet here and 172 feet, then 70 feet to the Boston, 242 feet, where would the Yucatan strike the Boston if she were lying here, say 130 feet of the Yucatan being up in here?

Mr. EVANS: How are those figures?

(Testimony of H. H. Hilton)

Mr. BECKWITH: If the Yucatan was 130 feet on the dock.

Mr. EVANS: Does that 130 feet mean above the angle there?

COURT: I understand the captain to testify about 130 feet up the dock.

Mr. BECKWITH: He said he didn't mean that angle there, because that part of the dock wasn't used. That would be 130 feet, and 42 feet, and 70 feet—242 feet.

COURT: What is the length of the Yucatan?

Mr. BECKWITH: 337 feet.

Q. Now, what is the length of the forecastle of the Boston?

A. The length of the forecastle of the Boston is 63 feet from bow to the peak of the superstructure.

A. That would strike, then, about 32 feet aft of the forecastle?

Mr. EVANS: May I suggest a question? How far is it from the bow of the Boston, to the first structure on the deck?

Mr. BECKWITH: That was 70 feet.

Q. Now, Mr. Hilton, you have been around the Boston a good deal during that time,— in March?

A. Yes, sir.

Q. Did you see many vessels come in and out that Globe Milling dock?

A. I have taken various docks. I took these

(Testimony of H. H. Hilton)

pictures from the Portland. I have seen the Portland the Yucatan come out from there two or three times.

Q. Did they ever go in close to the Boston before? Had you ever seen them?

A. Yes, those pictures I took show the Portland in very close to the Boston.

Q. That is, when lying at the dock?

A. Yes.

Q. I mean, getting away from the dock. Did you ever see them swing in close to the Boston as they went by? A. No, sir.

Q. The Boston had never been struck, or had any trouble with any vessels prior to that?

A. No, sir, not that I know of.

Q. This piano that was destroyed on the Boston—how long had the state had that piano, do you know?

A. The contract was made - - -

Q. Was it more than six months?

A. No, sir, I believe it was made along in the early part of October.

Q. Was it a new piano when you got it?

A. Yes, sir.

CROSS EXAMINATIIN

Questions by Mr. REED:

Mr. Hilton, please add up those figures so we can see them on a piece of paper. 130 feet the ship back, 40 feet more on the dock, then 70 feet.

(Testimony of H. H. Hilton)

A. Adds 240.

Q. 240, and the Yucatan is 337?

A. Yes, sir.

Q. So the Yucatan would have overlapped on the Boston the difference between 240 and 337?

A. Yes, sir; that would be 97.

Q. That would be 97 feet she would overlap, besides the length of the rope, spring line, whatever she had out?

Mr. BECKWITH: No, he said — — —

Mr. REED: I am asking the questions. Whatever part of the spring line she had out.

A. I don't know anything about the spring line.

Q. If he had it out. 97 feet would be the absolute distance on the Captain's testimony, according to Mr. Beckwith's figures?

A. Yes, sir.

Q. What? A. I guess so, yes.

Q. And how far was this forward gun from the bow of the Boston?

A. I couldn't say; I haven't measured it.

Q. Give a good guess, because you have measured everything else.

A. It might have been 85 feet.

Q. Yes; then she would have overlapped and hit that gun anyway, wouldn't she?

A. Yes, under that condition.

Q. Under that condition, it would have overlapped and hit the gun anyway?

(Testimony of H. H. Hilton)

A. If it was as you say, yes.

Q. As Mr. Beckwith said, not as I say. Go on those figures, and answer as Mr. Beckwith gave them to you, not as I gave them to you.

A. You are asking the questions.

Q. Aren't those the same figures he gave you, or am I wrong?

A. Well, I am just guessing; just guessing at those distances.

Q. I know you are just guessing. I don't say you are anything but guessing on it; but please state then if would have hit the gun, or not, on Mr. Beckwith's figures?

A. Certainly.

Q. Yes. That is all.

Witness excused.

Mr. BECKWITH: That is our case.

LIBELLANT RESTS.

(Testimony of Robert B. Smith)

COUNTY'S CASE.

ROBERT B. SMITH

Recalled on behalf of Multnomah County.

DIRECT EXAMINATION

Questions by Mr. MAURY:

Your name is Robert B. Smith?

A. Yes, sir.

Q. What was your occupation, Mr. Smith, on the 3rd day of March, 1914?

A. Charge of the Broadway Bridge, Portland, Oregon.

Q. You were in charge? A. Yes, sir.

Q. Foreman? A. Yes, sir.

Q. Do you remember—what were your duties as foreman, Mr. Smith, of the Broadway Bridge?

A. That of an operator. To keep things in its place, and to look after the men on the bridge.

Q. How many men did you have?

A. Eleven, all told, sir.

Q. On the bridge? A. Yes, sir.

Q. Just tell the Court how it is operated, Mr. Smith.

A. Just tell what, sir?

Q. Just tell the Court how that bridge is operated.

A. The man attending to duty keeps a watchful eye for boats coming north or south in the river.

(e stimony of Robert B. Smith)

After the boat's signal is given, to raise the draw, he uses his own discretion, as far as I knew, or ever done, at the time to open the draw, at the distance the boat may be from the draw. And I heard the boat in question whistle, but didn't know at the time it was that boat, and didn't know where it really came from, but I heard the alarm for that draw.

Q. I just want to make this more chronological, is the only thing. At what time did this happen? At what time did the collision between the Yucatan and the Boston happen?

A. Between the hours of eleven and one, I should judge, sir. Sometime the noon hour.

Q. Some time between eleven and one?

A. I think so.

Q. The question I asked a minute ago was not to describe this particular accident, but to describe to the Court the way the bridge is operated, as a general rule, so we can get it in the record.

A. After hearing a whistle, or an alarm to go through the bridge, the operator rings a bell, which brings the gatemen to their place, and they shut the gates, shut the gates to the traffic on the bridge. After that has been done, and the gatemen look carefully to see that no passengers or anything on the bridge, the operator is given a signal to raise the bridge. With that he goes ahead and raises the draw and waits for the boat to enter.

Q. And how is that given? Tell about opening the draw? How long does it take to open the draw?

(Testimony of Robert B. Smith)

A. In my experience, sir, I probably took from a minute, maybe, to clear the track—a minute and a quarter or something like that. Perhaps along a minute, a minute and a quarter or sometimes less, to raise the draw.

Q. To clear the traffic, of course, depends upon the condition of the traffic at the time?

A. Exactly.

Q. The Yucatan went through there about noon, you say?

A. Approximately noon, yes, sir.

Q. Now, Mr. Evans wants this brought out. What machinery is used to raise that draw?

A. Two controllers.

Q. What is that? A. Two controllers.

Q. Just what is done?

A. You mean to operate?

Q. Yes; to raise the draw.

A. To see that every switch is in its place, the air—have a required number of pounds of air, and to release air, release the brakes and apply, as the phrase is, the juice to the machinery, and up goes the draw.

Q. How do you do that? How do you apply the juice?

A. By working the controllers around the different numbers or the different figures. One man operates both sides, both levers.

Q. Those controllers, what are they like? Something like on the street cars?

(Testimony of Robert B. Smith)

A. Similar to the street cars, yes, sir.

Q. What was the condition of the traffic about noon, March 3rd, about the time the Yucatan went through there?

A. You mean – – –

Q. The condition of the traffic on the Broadway Bridge.

COURT: At the time you heard the Yucatan's alarm, what was the condition of the traffic?

A. Why, sir, as far as I can recollect, why, I didn't particularly notice the traffic; as usual; a few teams going backward and forward, and cars making the regular trips, sir.

Q. The traffic at the noon hour, how is it with reference to the traffic at other times of the day?

A. More after noon than at the noon hour, because of the noon rest.

Q. The traffic is not so heavy, you mean?

A. The traffic not so heavy, no, sir.

Q. Which way was the Yucatan pointed when he gave his first signal?

A. If the river was north and south, she pointed south.

Q. Had she yet begun to make the turn?

A. No, sir.

COURT: I understood you to say you didn't know where it came from when you first heard his signal.

A. No, sir.

(Testimony of Robert B. Smith)

COURT: How do you know what the Yucatan was doing?

A. That probably will came later, I suppose.

Q. Did you look at the Yucatan when you heard the signal?

A. Looked all around the river; could see nothing moving.

Q. Took notice of the Yucatan, did you?

A. If I remember right, there were only two boats on that side of the river, where the sound of the whistle came from, and on the other side, I don't recall about any being there, but I saw no boats in motion.

Q. The Yucatan was pointing straight upstream, is that right?

A. Yes, sir.

Q. Did you hear the second signal?

A. I did, sir.

Q. And which way was the Yucatan pointing then?

A. South southwest, sir.

Q. South southwest?

A. South southwest, sir.

Q. That means more south than west?

A. Yes, more south than west.

Q. And her stern was fast to the dock, was it?

A. That I couldn't tell from there, sir; I couldn't tell about that.

Q. Now, what position was the Yucatan in when you opened the draw?

A. Well, sir, as near as I could see, I would say

(Testimony of Robert B. Smith)

due west; maybe a trifle to the south, may have been a trifle to the north, but I am positive that she was looking to the west.

Q. And did the bridge remain open from that time on until she got through?

A. It did, sir.

CROSS EXAMINATION

Questions by Mr. REED:

Mr. Smith, while she was pointed as you say about west when the bridge commenced to open, was that before or after the danger signal?

A. That, sir, was just as I had the bridge open; as I raised—as I had the draw open, sir.

Q. I say, was that before or after the danger signal? They all swear he gave the danger signal.

A. Yes, yes.

Q. Yes.

A. Well, when I raised the bridge, I looked and saw the—when I gave the order to raise the bridge, and commenced to raise the bridge, the boat was then due west.

Q. Almost due west?

A. As near as I know.

Q. After he raised; then he gave the danger signal after that, did he?

A. No, sir; gave no whistle after that.

Q. The danger signal was before that?

A. Was due west when the danger signal, as you call it, was given.

(Testimony of Robert B. Smith)

Q. But the bridge was open then.

A. Well, near due west, I suppose this way. When I commenced to open the draw, he was still near due west.

Q. Was the danger signal given before or after you commenced to open the bridge?

A. Oh, certainly before.

Q. Given before? A. Yes.

Q. How long between the time of the first whistle—how long between the time of the first whistle and the time the bridge opened?

A. My dear sir, I forget, and I made a statement to you which said to you, making it one minute longer than what the log in the ship testified to.

Q. What was that? A. I forget, sir.

Q. Didn't you tell me it was 19 minutes, in Mr. Holman's presence in my office—19 minutes between the signal and the time the draw lifted?

A. That I couldn't say, sir.

Q. You don't remember?

A. I don't remember that part of it, no.

Q. That is forgotten by you?

A. I wish I did.

Q. That is all right. We will prove it by Mr. Holman. Now, then, do you have any recollection of the danger whistle at all that day?

A. Oh, yes, sir; yes. I recollect it.

Q. Did you see anything of this contact between the Boston and the Yucatan?

A. No, sir, I didn't see that.

(Testimony of Robert B. Smith)

Q. Why didn't you look at it?

A. Because when I heard the danger signal, I thought I had better open the draw. I had no time. The boat was in position for the draw, and so I opened the draw. I didn't see that.

Q. The draw opens in about a minute.

A. I know, sir.

Q. How long does it take to swing around from the rest position?

A. I was at my post.

Q. Your post is a look-out position?

A. Not when I have the machinery in hand.

Q. Just the same it is glass all around for the purpose of seeing.

A. You can't see out.

Q. You mean to say you can't look out that window and see the Yucatan?

A. Not all around, when the draw is open.

Q. So you were in position where you couldn't see at all? A. Oh, no, sir.

Q. Then you couldn't see the ship across the river, if you couldn't see.

A. I didn't see the action.

Q. No, but east and west. If you can't see out the look-out box, how do you know she was east and west?

A. Because I didn't commence to open the draw when she was east and west, sir.

Q. Now, what was the reason you didn't open,

(Testimony of Robert B. Smith)

Mr. Smith, at the time of the first signal? Because you didn't know what boat it was?

A. Well, I will tell you, sir, if I may use my own language.

Q. Go ahead and tell the Court.

A. I was in my place of duty, and I heard the signal. I looked around and saw no boats in evidence anywhere. I went down the deck and crossed the other side of the river, the south side of the bridge, and asked the gateman, and I saw no boats in sight; well, we went on for a little while; when she had pulled out a little, gave a second signal; never at any time in position for the bridge. I hesitated then about opening the draw.

Q. Hesitated? A. Yes, sir.

Q. Why?

A. Because the boat was anywhere but in position for the draw.

Q. So, though you heard both the signals for the bridge, you nevertheless didn't open?

A. No, sir, I didn't open.

Q. You declined to open on the whistle?

A. She wasn't in position for the draw.

Q. So that was the reason the bridge didn't open?

A. Yes, sir.

Q. Because she wasn't in position?

A. Yes; I told you, and you asked for the reason for the danger signal.

Q. Yes.

A. After she had blown the danger signal, I opened

(Testimony of Robert B. Smith)

the bridge, and I didn't know, sir, until after the boat had passed through, that she had struck—the Yucatan—until the gates were closed again.

Q. All right, Mr. Smith. Now, then, in the house where the levers are operated, there is a good deal of electrical machinery, isn't there?

A. Yes, sir.

Q. The sides of the house are filled with switches and contrivances? A. Yes, they are.

Q. And it requires some knowledge of electricity to handle them, doesn't it?

A. So I am told, yes, sir.

Q. You know that?

A. I think I know, yes sir.

Q. Does it, though? A. Sir?

Q. Does it require any knowledge about that sort of thing?

A. Well, sir, I have lived 56 years, and everything I have undertaken sir, has required knowledge.

Q. No, but I mean about this, these in there. Should there be some knowledge about electricity and that sort of thing? Well, as a matter of fact, didn't the bridge close once for 45 minutes, and stay that way, because nobody knew how to put in a switch plug?

Mr. MAURY: I don't see the point of this examination. There isn't any charge of any negligence over that delay in opening the draw. That is the only negligence of any kind charged. I cannot see the use of that, and I object to it on that ground.

(Testimony of Robert B. Smith)

COURT: Go ahead.

Q. Didn't you have to telephone to Wilson to come over and put in a switch plug? To put in one of those fuses?

A. I don't know the minutes we closed. I telephoned I wanted a workman to come over.

Q. You didn't know what was the matter, and had to telephone to a man to come over and put the fuse in, wasn't it? A. No, sir.

Q. A switch plug?

A. No, sir; didn't telephone for him to come, and set any one special fuse, no, sir.

Q. That is what he did?

A. Mr. Wilson found the fuse that was out.

Q. He found the trouble was a burnt fuse, which you hadn't found.

A. I hadn't found that one at that time.

Q. Do you know how long that delayed the bridge?

A. I don't know, sir.

Q. Now, Mr. Smith, during the time this bridge didn't open on the signal given by the Yucatan,—you heard the signal? Did you display a red flag or a red ball, or anything? A. No, sir.

Q. Did you ever read the regulations?

A. No, sir.

Q. You don't know what they were?

A. No, sir.

(Testimony of T. C. Conners)

REDIRECT EXAMINATION

Questions by Mr. MAURY:

Just one question I want to clear up. You are clear in your own mind as to the direction in which the boat was pointing when the draw did open?

A. I am clear, sir.

Q. What direction was it?

A. When the draw was open?

Q. Yes. A. Due west, sir.

Witness excused.

T. C. CONNERS

A witness called by the County, being first duly sworn, testified as follows.

DIRECT EXAMINATION

Questions by Mr. MAURY:

Mr. Conners, what is your occupation?

A. Bridge tender.

Q. What was your occupation the 3rd day of March, 1914? A. Bridge tender.

Q. Where? A. Broadway Bridge.

Q. And what part of the bridge did you work on?

A. On the east end.

Q. Were you there at the time the Yucatan went through the Broadway Bridge? A. Yes, sir.

Q. Through the draw? A. Yes, sir.

Q. Did you hear a signal for the Broadway Bridge on that day from the Yucatan? A. I did.

(Testimony of T. C. Conners)

Q. And the first signal you heard, which way was the boat pointing?

A. Well, she was pointing pretty near right across the river; due west a little; might have been a little to the south.

Q. Was that the first signal you heard?

A. Yes, sir.

Q. What position was she in when the draw opened, Mr. Conners? A. When the draw opened?

Q. Yes.

A. Well, she was a little to the northwest, I think, swinging towards the north.

Q. And the draw remained open from that time on, did it? A. Yes.

Q. You only heard one signal, did you?

A. I heard two.

Q. You heard two signals? A. Yes, sir.

Q. Which way was she pointed at the first signal?

A. The first signal I told you she was pointing pretty near west, but over to the south.

Q. That is pointed southwest?

A. Yes, and she was swinging; she was swinging towards the north, and it was a little by due west, when she whistled the second time.

Q. And at the time the draw was opened?

A. At that time, they rung the bell to clear the bridge.

COURT: At the time the second whistle was given, they rang the bell to clear the bridge?

A. Yes, sir.

(Testimony of T. C. Conners)

COURT: The draw wasn't open then?

A. Not at that time.

Q. How long did it take to clear the bridge?

A. Well, I should judge at that time, probably a minute and a half, or two minutes. Something like that if I recall; maybe not so long.

Q. The vessel was pointing north of west, northwest, when the draw was cleared.

A. Still swinging, yes, sir.

Q. And was still swinging? A. Yes, sir.

CROSS EXAMINATION

Questions by Mr. REED:

Were you the man that Smith talked to?

A. No, sir.

Q. He says he went down and talked to some one.

A. That might be the man on the west end of the bridge, the operator from the west end, and I was on the east end.

Q. What did you do then? What was your duty when that whistle blew?

A. To close the gate, the passenger gate, to save anybody from going on—cars and wagons.

Q. Does anybody keep any records over there?

A. Records of what?

A. Times or anything? A. What for?

Q. Whistles and boats and draws.

A. The operator keeps a record. Every boat that goes through, and the time it takes to go through.

(Testimony of T. C. Conners)

Q. Does the gateman?

A. The gateman, no. They have nothing to do with that.

Q. Did you hear the danger whistle, Mr. Conners?

A. Well, I didn't—I heard some whistle, but I think, if that danger whistle blew, it blew for the Boston, I don't think it blew for the bridge.

Q. Did you hear the danger whistle from the Yucatan?

A. I say I heard the whistle, but I wasn't positive what it was, but I say if a danger whistle, the danger whistle was blown for the Boston.

Q. Oh, the danger whistle of the Yucatan was blown for the Boston and not for the bridge?

A. I don't think so, because I don't know as she would have any right to blow, for the bridge at that time, when it blowed, when they claim it blowed.

Q. What would they do on the Boston? They couldn't use her.

A. Only to signalize they were coming in.

Q. Why should they go in if the bridge was open?

A. I didn't say it was open then. I said the bell rang when she was in that position; kind of north of northwest, and the bell rang, and we closed the gates and cleared the draw, and gave the proper signal, the bridge was cleared, and then there is about 40 or 50 feet of stationary span after they get clear lifted—as soon as we get clear of that, we give the operator a signal, and then we attend to getting people outside of the gates, and have to stand by the

(Testimony of T. C. Conners)

gates to keep it open from the rail, and still stop up a space in the middle, so that one can't get through it, a motorcycle, or anything of that kind; and we have to give our attention to that.

Q. If she blew her danger signal, while pointed northwest, and the draw was open, she must have blown for the Boston. A. How is that again?

Q. How was she when the danger signal blew?

A. I say, I don't know as I particularly heard any whistle, but I say if there was a danger whistle blew, it was blew because she was drifting on top of the Boston.

Q. Why should she drift on the Boston if the bridge was open?

A. That is what I want to know.

REDIRECT EXAMINATION

Questions by Mr. MAURY:

The bridge was opened, was it?

A. Yes, after the bell given and the signal given to operate.

Q. What direction was the boat when the draw was cleared?

A. I guess the boat was pretty well due north, about downstream north, going through.

Q. How is that again?

A. I say, she was pretty well north and south.

COURT: When the draw was cleared, she was about north and south?

(Testimony of T. C. Conners)

A. Pretty near, sir, when the signal was given the operator to open.

COURT: With the bow to the north?

A. Yes, sir.

Examination by the COURT.

Q. And was facing the bridge? A. Yes, sir.

Q. That is, when the signal was given to close the draw?

A. No, she wasn't quite in that position at that time, but at the time the bridge started to open, she was pretty near due north.

Q. What position was she in when the signal was given to clear the draw?

A. Kind of north northwest.

Q. Who gave the signal to clear the draw?

A. The foreman or operator, he rings the bell.

Q. Was Smith the operator at that time?

A. He was, sir.

Q. And then it took about a minute or a minute and a half to clear the draw?

A. Yes, probably a minute or a minute and a half or two minutes; something like that.

Q. What position was the Yucatan in when the draw began to open?

A. To a certain extent—you see there is a lot of people on the stationary span, and I had to throw my attention to them, to block the center of the bridge, and still keep a space between the end of the gate and the rail, so you won't jam anybody

(Testimony of T. C. Conners)

going through. But when I looked around, the bridge was opening, and she was pretty well due north.

Q. The bridge opening? A. Yes.

Q. How wide open?

A. I should judge it was probably open in that shape (indicating).

Q. 15 or 20 feet—25 feet across?

A. Yes, she was 40 feet across.

Q. 40 feet across? A. Must have been.

Mr. EVANS: How wide is that draw there?

A. That is 250 feet on both sides; about 125 each.

Q. (Court) Did you notice at that time, when the draw began to open, did you notice the Boston? Did you see the Boston?

A. I seen the Boston just afterwards, as the boat was swinging in on it.

Q. As what?

A. As the boat was drifting in on her, alongside of her.

Q. You saw the Boston after the boat was drifting?

A. Well, of course the Boston was moored there, and the Yucatan was drifting. She was going towards the east side, and of course after I got my gate closed, and my attention - - -

Q. Was that before or after the draw began to open?

A. That was after the draw began to open.

Q. After the draw began to open.

A. Yes, because when the draw began to open, I was tending gate, and the people were going through.

Witness excused.

(Testimony of W. E. Reed)

W. E. REED

A witness on behalf of the County, being first duly sworn, testified as follows.

DIRECT EXAMINATION

Questions by Mr. MAURY:

Mr. Reed, what is your occupation?

A. Bridge tender.

Q. On what bridge?

A. Broadway. I am on the Steel Bridge now.

Q. On what bridge were you employed the 3rd of March of this year? A. The Broadway Bridge.

Q. As bridge tender? A. Yes, sir.

Q. On what part of the bridge did you work?

A. West side.

Q. Do you remember the occasion of the Yucatan going through the draw on that day?

A. I do.

Q. Did you hear any signals given by the Yucatan for the bridge? A. I did.

Q. Which way was the Yucatan pointing the first signal you heard? A. South.

Q. Due south? A. Yes.

Q. Was she moving yet? A. No, sir.

Q. She was lying at the Globe Milling Company's dock pointing south? A. Yes, sir.

Q. Which way was she pointing the next signal you heard?

A. She was pointing towards the west, and then

(Testimony of W. E. Reed)

she drifted south, and hit her nose right into the steel bridge, and the captain, it looked to me, got scared, and blew the whistle, and they began to back.

Mr. EVANS: You don't mean the Steel Bridge.

A. Yes, put her nose up against the Steel Bridge.

Q. Which way was the boat pointed when the draw was cleared?

A. When the draw was cleared, to the northwest.

Q. When the draw was cleared?

A. He was more north than any way.

Q. More north than west? A. Yes.

Q. How far north, would you say?

A. Oh, quite a good deal; quite a good deal.

CROSS EXAMINATION

Questions by Mr. REED:

Mr. Reed, let me understand about that whistle. Do you understand that she whistled for the Broadway Bridge to close?

A. She whistled one whistle for it to open. She was against the dock; then a little while she swung out and got out in the stream and she whistled again; then she went over towards the steel bridge; drifted more that way; got her nose up there, and then she blew the danger signal, I call it, and kept backing, backing; still she was on a rope or something and she hit the Boston.

Questions by Mr. EVANS:

Which is the Steel Bridge?

(Testimony of W. E. Reed)

A. The Steel Bridge is south.

Questions by Mr. REED:

Were you the man Mr. Smith spoke to, about whether to open the draw or not?

A. Spoke to a fellow named Riggen, Jack Riggen.

Q. And you too? A. Yes, sir.

Q. And you held a consultation about whether to open the draw?

A. No, sir, he just came downstairs and said, "that fellow must be up against it now, and I said yes."

REDIRECT EXAMINATION

Questions by Mr. EVANS:

You said sounded the danger signal, when had her bow towards the Steel Bridge. A. Yes, sir.

Q. And the Steel Bridge is the one on the south?

A. Yes, sir.

Q. And you were on the Broadway Bridge?

A. Yes, sir.

Q. And he sounded the danger signal before he got headed towards you at all? A. Yes, sir.

Q. You have heard all these other witnesses testify?

A. That is the way it looked to me.

Q. They all testified he had swung plumb around, and was headed nearly in towards the Boston, before he sounded the danger signal.

A. She kept blowing the danger signal until she hit the Boston.

Q. Commenced when headed – – –

(Testimony of W. E. Reed)

A. For the Steel Bridge.

Q. Which way would the boat be headed when headed towards the Steel Bridge? A. South.

Q. Well, Mr. Reed, either I am confused, or you are; one of the two. The Steel Bridge is the one the railroad goes over, the Harriman Bridge?

A. Yes, sir.

Q. And you testified to begin with, that she – – –

Mr. REED: Their own witness.

Mr. EVANS: I know, but I am free to say we are much surprised by the testimony of this witness, and I ask the Court to indulge me.

COURT: Go ahead.

Q. You testified first the boat was headed south, when the first whistle was blown?

A. Yes, and then she swung out.

Q. Then she swung out? A. Yes, sir.

Q. She hadn't sounded any danger signal then?

A. No.

Q. She was headed towards the west?

A. Towards the south.

Q. About how any degrees? Do you have any idea?

A. I couldn't say; I never studied degrees. Her nose was right about south to the steel bridge.

COURT: You are confused now, I know. Mr. Evans is referring to the second whistle.

A. Second whistle, she was out in the stream.

COURT: What?

(Testimony of W. E. Reed)

A. She was out west.

COURT: Lying across the stream, was she?

A. Yes, sir.

COURT: At the second whistle?

A. Second whistle, yes, sir.

COURT: Now, when was the danger whistle?

A. The danger whistle, she was towards the Steel Bridge.

COURT: The danger whistle was after the second whistle? A. Yes.

COURT: Then she had turned south?

A. South.

COURT: She turned south between the second and the danger whistle? A. Yes.

COURT: She turned her bow south?

A. Yes.

COURT: Had she let go of the line then?

A. Well, I don't think she had.

COURT: You don't know?

A. I couldn't say to that.

COURT: And then after the danger whistle, did she turn around?

A. She kept backing; then she turned around.

COURT: She has to turn around to get her bow towards the Broadway? A. Yes, sir.

COURT: So she turned around after the danger signal?

(Testimony of W. E. Reed)

A. Yes, turned around, and then drifted over towards the Boston, and hit the Boston.

COURT: I understand you at the time the danger signal was given, and that was after the second signal whistle, her bow was pointing towards the Harriman Bridge? A. Yes.

COURT: Then she turned around?

A. She backed in and then turned around.

COURT: She backed in and turned so the bow was north? A. Yes, sir.

COURT: When did the bridge begin to open?

A. It opened when she turned around.

COURT: After the danger signal? A. Yes.

COURT: Didn't begin to open at the second signal at all? A. No.

COURT: Not until after the danger signal?

A. Not until after the danger signal.

Q. (Mr. Evans) Now, you remember the other day talking with Mr. Maury in my office.

A. Yes.

Q. Didn't you tell him that after giving the second whistle, the Yucatan kept swinging and was held fast by the stern line to the dock? A. Yes.

Q. And during all that time you kept clearing the traffic? A. Yes.

Q. And finally, when the Yucatan was about abreast of the current, you had the traffic cleared? (Reading from statement). A. Yes.

(Testimony of W. E. Reed)

Q. And were beginning to open the draw?

A. Yes.

Q. And the Yucatan swung a little further, and reached the point where she ought to have let loose, and headed for the draw she gave the danger signal, and backed up a little, and kept on swinging around in the same direction?

A. Yes, she kept swinging right around. That is right.

Q. Then she swung on down and hit the Boston?

A. Yes, she swung around and hit the Boston. I don't think she ever let go any rope.

RECROSS EXAMINATION

Questions by Mr. REED:

Was that statement written up before you went to the District Attorney's office or afterwards.

A. When I went to the District Attorney's office?

Q. Was it written before you went there or afterwards?

A. Written while I was there. Right before me.

Mr. MAURY: That was your own statement?

A. That is my own statement.

Mr. MAURY: It wasn't put up to you? You made that statement?

A. I made that statement myself.

Mr. REED: Here is an employee they are bringing here and forcing him to tell a story, not only that, but bringing here a sworn statement.

(Testimony of Captain W. W. Pope)

Mr. MAURY: It is not sworn.

Mr. REED: And making him say the thing was dictated by himself. I object to it.

COURT: Proceed with the examination. Tell what he knows about this matter.

Witness excused.

CAPTAIN W. W. POPE

A witness called on behalf of the County, being first duly sworn, testified as follows.

DIRECT EXAMINATION

Questions by Mr. MAURY:

Captain Pope, where do you live?

A. Portland, 441 West Park.

Q. What is your occupation?

A. Master and Pilot.

Q. How long have you been Master and Pilot?

A. Since '83.

Q. On this harbor all the time?

A. Yes, sir.

Q. And been working at that continuously, have you? A. Yes, sir.

Q. Do you know the steamship Yucatan?

A. Yes, sir.

Q. Have ridden on her? A. Yes, sir.

Q. And you have handled boats of that size and character, in this harbor, have you?

A. Yes, sir.

Q. Now, you heard Captain Paulsen's testimony

(Testimony of Captain W. W. Pope)

as to the way she was turned around on this day in question, didn't you? A. Yes.

Q. You were sitting back and heard all this testimony? A. Yes.

Q. You heard him say the current was two knots an hour? A. Yes.

Q. And that the wind was about 15 miles—southwest, wasn't it?

Mr. REED: Southeast.

Q. Southeast wind, yes. You heard him describe the manner in which he turned the boat around?

A. Yes.

Q. Now, based on your experience as a pilot, in turning around the Yucatan at that place, under those circumstances, and in that manner, to go through the Broadway Bridge, at what time should the pilot cast loose from the stern line and head out for the draw?

A. Well, I should say from 100 to 120 degrees.

Q. And if a man hung on longer than 120 degrees, you would say he was hanging on too long under the circumstances, would you?

A. That depends on the circumstances.

Q. I mean, under those circumstances I related.

A. If the bridge was opening, he had a perfect right to let go. If not had a right to hold on.

Q. If the bridge was opening, when he reached 120 degrees, he should have let go? A. Sure.

Q. And if he did let go at 120 degrees, and the bridge was opening at 120 degrees, he should have

(Testimony of Captain W. W. Pope)

got through the bridge without trouble. Is that so? What would you say?

A. Under ordinary circumstances, he probably would have gone clear.

Q. Under the circumstances in this case?

A. Under ordinary circumstances.

Q. Yes; under these circumstances.

A. Well, I cannot say that. The wind and the current evidently caught him, and set him against the Boston.

Q. The wind and current.

A. The wind and current evidently set him against the Boston.

Q. Then if the bridge was open at that point, you couldn't attach any blame to the bridge, could you? If the bridge was open when he reached that point. A. Of course - - -

Mr. REED: We don't claim that. We are not claiming any damage to the county if the bridge was open. I don't want to get off on that. We claim the bridge was not opened. If the bridge was open, we have nothing to do with it but pay.

Mr. MAURY: The testimony of Captain Paulsen was to the effect that the bridge was open at 120 degrees.

COURT: He said he let go at 120 degrees.

Mr. MAURY: And the bridge was open before he let go.

(Testimony of Captain W. W. Pope)

COURT: I don't know whether he testified to that or not.

Mr. MAURY: That was the testimony, I think, your Honor, that was emphasized in the last question. Captain Paulsen: Blew the danger signal at 120 degrees.

Mr. REED: Ask Captain Paulsen.

Mr. EVANS: I am satisfied to stand by the record.

Mr. MAURY: May he answer that question?

COURT: Certainly.

Q. If the bridge was opening at 120 degrees, and the line cast off at 120 degrees, under the circumstances in this case, could you attach any blame to the bridge if the boat didn't go through it right.

COURT: The boat did go through all right, but ran into the Boston in doing it.

Q. For anything that happened before it did go through, would the bridge be to blame?

A. Well, now, I was not there. I am only answering what I would do if there. I would probably let go at 120 degrees, taking chances on doing any damage, as Captain Paulsen did.

Witness excused.

COUNTY RESTS.

(Testimony of Captain A. C. Paulsen)

CAPTAIN A. C. PAULSEN

Recalled by the Claimant.

DIRECT EXAMINATION

Questions by Mr. REED:

Captain Paulsen, where did you say the boat was pointed when the danger signal was blown?

A. When the danger signal was blown?

Q. Yes.

A. When the danger signal was blown it was pointed about 110 or 120 degrees.

Mr. EVANS: It was at 110 or 120. Which was it?

A. I said in the former statement 120 degrees, I think.

Mr. REED: You can't tell exactly. That is all.

CROSS EXAMINATION

Questions by Mr. BECKWITH:

You say the bridge was opening when you blew the danger signal!

A. I would have no occasion to blow that danger signal if the bridge had been open.

Q. Under ordinary circumstances, if it happened to be a merchant ship in there, and had been in that position, you say you would have held onto your lines and gone up against the ship?

A. Taking chances going up alongside the ship.

Q. In other words, it would do less damage in

(Testimony of Rufus C. Holman)

going along the ship that way, than in moving and raking her?

A. I wasn't figuring that. It would do less damage to go up against another ship than against the Boston. That was all I figured.

Mr. EVANS: And you cast off at the time you sounded the danger signal?

A. No, I cast off as the bridge commenced to open.

CROSS EXAMINATION

Questions by Mr. EVANS:

When was that with reference to the sounding of the danger whistle?

A. After I sounded the danger signal.

Q. How soon? A. Very soon after.

Q. Before you hit the Boston, did you cast off or after? A. Well, it was after.

Q. And you hit the Boston just a few seconds after sounding the danger signal?

A. I hit the Boston as soon as the bridge opened, whether a few seconds, I don't know.

Q. You know which it was.

A. Pretty hard to remember a few seconds, you know.

Witness excused.

RUFUS C. HOLMAN

A witness called on behalf of the Claimant, being first duly sworn, testified as follows.

(Testimony of Rufus C. Holman)

DIRECT EXAMINATION

Questions by Mr. REED:

Please state your name and occupation?

A. Rufus C. Holman, Manufacturing Stationery.

Q. Mr. Holman, I will ask you whether or not you were present in my office on or about the 13th day of April, with Mr. Smith, who has just testified, and whether or not you heard Mr. Smith state the length of time between the first signal and the opening of the draw of the Broadway Bridge at the time of the collision?

Mr. EVANS: Objected to as incompetent, immaterial and irrelevant. Anything that Smith may have said wouldn't bind the county.

COURT: Wouldn't be for any purpose except to impeach Smith, and he said de didn't know.

Mr. REED: I know he did.

Witness: Shall I answer the question?

Mr. REED: No, don't answer.

COURT: That is only for impeaching purposes, and I am not impeaching Smith.

Q. What else is your occupation?

A. Well, I am County Commissioner.

Q. The County Commissioners have charge of the bridges, and employ the workmen, don't they?

A. They do. In this particular case, and at this time there was a superintendent of bridges and ferries, who had immediate control.

(Testimony of Rufus C. Holman)

Q. Appointed by the Commissioners?

A. Yes.

Q. And the gentleman that just objected is the District Attorney acting for the Commission?

A. The District Attorney has advised the County Commission.

Q. Who is objecting to your telling what the bridge tender said at that time.

COURT: I guess we will take that for granted.

Mr. REED: No, I want that in the record. Is that right?

A. Yes, it is.

Witness excused.

CLAIMANT RESTS

LIBELLANT RESTS

COUNTY RESTS.

Libelant's Exhibit "A".

CLW 520-8 ALU-HDH

UNITED STATES ENGINEER OFFICE

Second District

321 Custom House

Portland, Oregon

November 13, 1913.

The Oregon Naval Board,

Mr. H. Beckwith, Chairman,

Portland, Oregon.

Sirs:

Referring to written request dated October 18, 1913, for permission to drive a dolphin in the Willamette river, I have the honor to inform you that, upon the recommendation of the Chief of Engineers and under the provisions of Section 10 of the act of Congress approved March 3, 1899, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," you are hereby authorized by the Secretary of War, subject to the special War Department conditions of August 13, 1913, (copy herewith) for such construction in general to place the dolphin in the Willamette river opposite Block No. 3, McMillens Addition to the City of Portland, Oregon, in accordance with the plans shown on the attached sheet; this authority to cease

and be null and void on October 13, 1916, unless previously revoked or renewed.

By direction of the Secretary of War:

J. F. McIndoe
Major, Corps of Engineers.

1 Inclo. (5)
accomp'g.

CONDITIONS PERTAINING TO ALL WAR DEPARTMENT PERMITS FOR BRIDGE FENDERS, BOOMS, DOLPHINS, PILES, OR SIMILAR OBJECTS OF A TEMPORARY CHARACTER IN NAVAGABLE WATERS OF THE UNITED STATES.

(a) That this authority does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining State assent to the work authorized. IT MERELY EXPRESSES THE ASSENT OF THE FEDERAL GOVERNMENT SO FAR AS CONCERNS THE PUBLIC RIGHTS OF NAVIGATION. (See Cummings v. Chicago, 188 U. S. 410.)

(b) That the work shall be subject to the supervision and approval of the engineer officer of the United States Army in charge of the locality, who may

temporarily suspend the work at any time if, in his judgment, the interests of navigation so require.

(c) That there shall be no unreasonable interference with navigation by the work herein authorized.

(d) That if inspections or any other operations by the United States are necessary in the interests of navigation, all expenses connected therewith shall be borne by the grantee.

(e) That if future operations by the United States require an alteration in the positon of the bridge fender, boom, dolphin, pile, or similar object, or if the latter, in the opinion of the Secretary of War, shall cause unreasonable obstruction to the free navigation of the said waters, the grantee will be required, upon due notice from him, to remove or alter the bridge fender, boom, dolphin, pile, or similar object or obstruction caused thereby, without expense to the United States so as to render navigation reasonably free, easy, and unobstructed. No claim shall be made against the United States on account of such removals or alterations.

(f) That there shall be installed and maintained on the work by and at the expense of the grantee such lights and signals as may be prescribed by the Bureau of Lighthouses, Department of Commerce.

(g) That if not otherwise specified in the permit, this authority, unless previously revoked under paragraph (e) above or specifically extended, shall

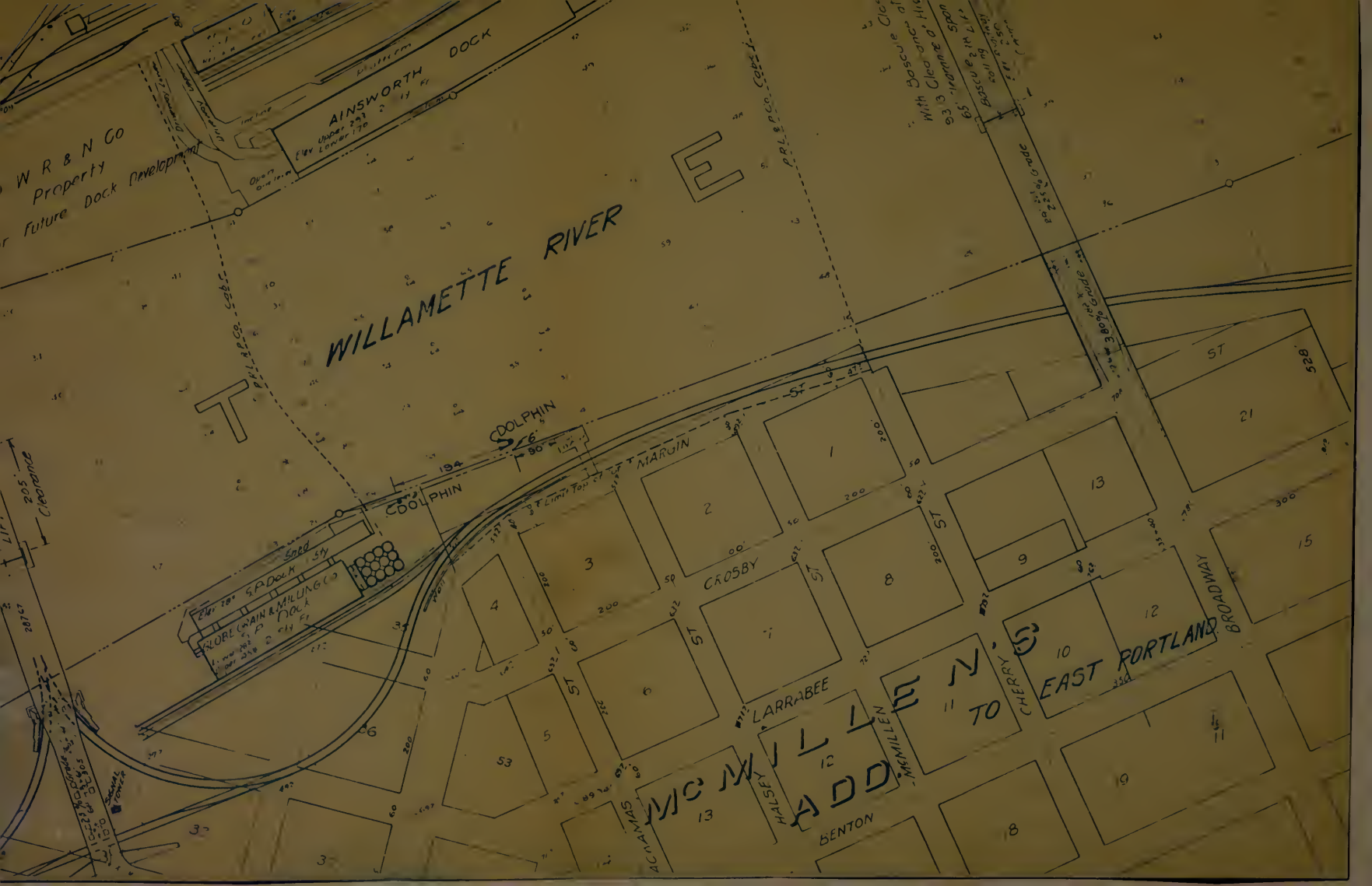
cease and be null and void at the end of the third full calendar year after its date.

(91171--C. of E.)

By authority of the SECRETARY OF WAR;

WM. T. ROSSELL
Brig. Gen., Chief of Engineers, U. S. Army

WAR DEPARTMENT,
Office of the Chief of Engineers,
Washington, D. C., August 13, 1913.


W R & N Co
Property
Future Dock Development
AINSWORTH DOCK
WILLAMETTE RIVER
PRL & PSO Co
DOLPHIN
MARQUAM
CROSBY
LARRABEE
MCMILLEN
ADD.
EAST PORTLAND
BROADWAY
CHERRY
ST
AVENUE
BENTON
HASSALO
ALVARADO
FLORL CHAIN & MILLING CO DOCK

Libellant's Exhibit "B–2."

THIS AGREEMENT.

Entered into this seventeenth day of June, 1911, by and between the United States, represented by R. F. Nicholson, Acting Secretary of the Navy, party of the first party, and the State of Oregon, represented by Oswald West, Governor, party of the second part,

WITNESSETH, That the said party of the first part, under and in pursuance of an act of Congress approved August 3, 1894, (Statutes at Large, volume 28, page 219), hereby agrees to loan temporarily to the State of Oregon the U. S. S. Boston, together with her apparel, charts, books, and instruments of navigation, as per invoices furnished with the vessel, upon the following terms and conditions, viz:

1. The said vessel shall be used only by the regularly organized Naval Militia of said State for the purposes of drill and instruction.

2. When the organization of the Naval Militia of the State shall be abandoned, or when in the judgment of the President the interests of the naval service shall so require, the vessel, together with her apparel, charts, books, and instruments of navigation, shall be immediately restored to the custody of the Secretary of the Navy in as good condition as when received by the State of Oregon, reasonable wear and tear excepted.

3. The State of Oregon hereby agrees to keep said vessel in good order and proper repair as set forth in the next succeeding paragraph and to abstain from making or causing to be made any alteration in the hull or machinery, or in any arrangement of the hull, machinery, spars, boats, or other equipment or apparel of the vessel, except such as may be authorized in writing by the Secretary of the Navy.

4. The repairs to the said vessel, her apparel, equipment, etc., shall be made at Government expense when authorized by the Secretary of the Navy on his own initiative or on the recommendation of the said State of Oregon.

5. The said U. S. S. Boston, together with her apparel, boats, charts, books, instruments of navigation, etc., shall, at all times while in the custody of the State, be open to inspection by such persons as the Secretary of the Navy may designate for the duty.

6. The State of Oregon hereby assumes, and will hold the United States free and acquitted from, all port, pilotage, and other charges accruing against said vessel while in the possession of the State.

7. The State will place in charge of the navigation of the said vessel a competent officer who, under the navigation laws, would be qualified and authorized to direct and control the movements of a vessel of like size, draft, character, and class in private ownership, and will not permit the vessel to be navi-

gated except under the direction and control of such officer. Further, the State will, when appropriate and necessary, employ qualified local pilots.

8. The State will place in charge of the boiler and machinery of said vessel a duly qualified and licensed engineer who, under the navigation laws, would be recognized as competent and authorized to assume sole charge of the engines and machinery of a vessel of like size, character, and class in private ownership; and will not permit steam to be raised or maintained, or the engines of said vessel to be moved, except under competent supervision.

9. The State further agrees to protect and defend the United States against any and all liability whatsoever growing out of claims for damages to property, personal injuries or loss of life, caused by said vessel while in collision or by touching or striking any vessel or structure on shore, afloat or submerged, or caused directly or indirectly by any explosion or accident of any kind whatsoever, occurring to, in or upon said vessel while in the charge and custody and under the control of representatives of the State; and does hereby release, discharge, and acquit the United States and all officers thereof from any liability or responsibility due to such cause.

10. Should any difference arise between the parties to this agreement as to any matter or thing connected therewith or arising therefrom, the same shall be submitted for decision to the Assistant Secretary of the Navy for the time being, and his determina-

tion thereof shall be binding and conclusive upon both parties.

The said State of Oregon, represented by Oswald West, Governor, hereby acknowledges the receipt of the U. S. S. Boston, at the port of Navy Yard, Bremerton, Washington, from the United States, together with her apparel, boats, charts, books, instruments of navigation, etc., as per invoices furnished with the vessel, and agrees to surrender the said ship, her boats, apparel, equipment, etc., at any time when required so to do by the Secretary of the Navy, or when the organization of the State Naval Militia shall be abandoned.

In Witness whereof the respective parties hereby have hereunto set their hands and seals the day and year first above written.

Signed and sealed in the presence of

(signed) OSWALD WEST
as
Governor of the State of Oregon.
The United States,

(SEAL OF THE STATE OF OREGON)
By
(signed) R. F. NICHOLSON,
As Acting Secretary of the Navy.
By the Governor—

(signed) BEN W. OLCOTT,
Secretary of State.

(Signed) LUSTAM B. JOHNSON
Solicitor,

as to R. F. NICHOLSON,
Acting Secretary of the Navy

(SEAL OF THE NAVY DEPARTMENT)

U. S. District Court
FILED
Oct 28 1914
G. H. Marsh, Clerk
District of Oregon.

Libelant's Exhibit "C–2."

THIS AGREEMENT, Made and entered into in duplicate this second day of February, 1914, by and between the OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, A private corporation, party of the first part, and the OREGON NAVAL BOARD, party of the second part, WITNESSETH:

WHEREAS, the said party of the second part, through its proper officers has requested that a permit be granted by the first party herein for the construction and maintenance of a pipe line, sidewalk and stairway and for the installation of a wire on, the property of the party of the first part on the East bank of the Willamette River, between Halsey and Clackamas Streets, if extended, as shown on the blue

print hereto attached and by this reference made a part hereof, for a period of five (5) years from February 2, 1914, and

WHEREAS, the Oregon-Washington Railroad & Navigation Company is willing to grant this permit for the construction and maintenance of said pipe line, sidewalk and stairway and for the installation of said wire, upon the express understanding and agreement that the sidewalk and stairway are not and will not be considered a public or private way or easement, and that the permission hereby granted is not to be considered as in any manner creating any obligations on the part of the party of the first part to maintain said sidewalk and stairway, and that no liability is to be incurred on the part of said party of the first part, by reason of the permission hereby granted, and

WHEREAS, the Oregon Naval Board is willing to accept the conditions hereby imposed by Oregon-Washington-Railroad & Navigation Company, this agreement WITNESSETH:

THAT the said party of the first part hereby grants permission to the said party of the second part to construct and maintain a three-fourths (3-4") inch pipe line, a sidewalk and stairway and to install a wire upon and over the property of the party of the first part on the East bank of the Willamette River between Halsey and Clackamas Streets, if extended, as shown in red on blue print hereto attached.

It is hereby distinctly understood and agreed that the said party of the first part is not in any way to be liable for any loss, damage or injury that may result to any person or persons growing out of the existence or maintenance of said pipe line, sidewalk, stairway or wire, and that said sidewalk and stairway is not to be deemed in any manner an easement or public way, and that this agreement is to be considered solely as a license, whereby the Oregon Naval Board is authorized to so maintain said sidewalk and stairway, and

IT IS FURTHER AGREED, that this permit is to run for a period of five (5) years form February 2, 1914, in consideration of ($1.00) Dollar, the receipt of which is hereby acknowledged, and in further consideration of the permit hereby granted the party of the second part hereby undertakes and agrees to use only the ground on which this permit is granted as hereinbefore specified and that it will at all times, save harmless and protect the said party of the first part against any liability or claim of any kind whatsoever growing out of, or in any manner connected with or resulting from the construction or maintenance of said pipe line, sidewalk and stairway or from the installation or maintenance of said wire.

It is hereby understood and agreed that said pipe line, stairway, sidewalk and wire are for the sole purpose of serving the U. S. Battleship "Boston," which said Battleship is moored in the Willamette River adjacent to the said sidewalk and stairway constructed on the premises hereinbefore described.

It is hereby mutually agreed by and between the parties hereto, that the party of the first part shall have the right to terminate this agreement in case the said party of the first part shall desire the use of said premises at any time upon the giving of thirty (30) days' notice thereof, mailed to the party of the second part at Portland, State of Oregon.

IN WITNESS WHEREOF, the party of the first part has caused this agreement to be signed by its Vice President and General Manager, and the party of the second part has hereunto subscribed its name, the day and year above written.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY,

By J. P. O'BRIEN
Vice-President & General Manager

OREGON NAVAL BOARD
By G. F. BLAIR,
Lt.Comdr. O.N.M., Sec't'ry.

Approved
M. J. BUCKLEY
General Superintendent

APPROVED AS TO FORM
C. C. ZWEIGART
For General Attorney

Approved as to Description
GEO. W. McMATH
Tax and Right of Way Agent.

(Seal
ADJUTANT GENERAL,
STATE OF OREGON
Official Copy).

U. S. District Court
FILED
Oct 28 1914
G. H. Marsh, Clerk
District of Oregon.

Claimant's Exhibit 5.

Form No. 1030.–Met'l.–Pacific Coast.

U. S. DEPARTMENT OF AGRICULTURE,
WEATHER BUREAU
MONTHLY METEOROLOGICAL SUMMARY.

Station, Portltand, Oregon; month, March, 1914.

Date	Temperature (Degrees Farenheit.) Max.	Min.	Mean.	Precipitation (In inches and hundredths.)	Character of day.	Reading of River Gage 8 a.m.
3	49	39	44	.22	Cloudy	10.1

Note.—"T" indicates trace of precipitation.

Edward A. Beals,
District Forecaster Weather Bureau.

U. S. District Court
FILED
Oct 28 1914
G. H. Marsh Clerk
District of Oregon.

Claimant's Exhibit 6.

RULES AND REGULATIONS

To Govern the Drawbridges Across the Willamette at Portland, Oregon.

THE LAW.

Extract from River and Harbor Act of August 18, 1894:

"Sec. 5. That it shall be the duty of all persons owning, operating, and tending the drawbridges now built, or which may hereafter be built across the navigable rivers and other waters of the United States, to open, or cause to be opened, the draws of such bridges under such rules and regulations as in the opinion of the Secretary of War the public interests require to govern the opening of drawbridges for the passage of vessels and other water crafts, and such rules and regulations, when so made and published, shall have the force of law. Every such person who shall willfully fail or refuse to open, or cause to be opened, the draw of any such bridge for the passage of a boat or boats, or who shall unreasonably delay the opening of said draw after reasonable signal shall have been given, as provided in such regulations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than two thousand dollars, nor less than one thousand dollars, or by imprisonment (in the case of a natural person) for not exceeding one year, or by both such fine and imprisonment, in the discretion of

the court: *Provided*, That the proper action to enforce the provisions of this section be commenced before any commissioner, judge, or court of the United States, and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States: *Provided further*, That whenever, in the opinion of the Secretary of War, the public interests require it, he may make rules and regulations to govern the opening of drawbridges for the passage of vessels and other water crafts, and such rules and regulations, when so made and published, shall have the force of law, and any violation thereof shall be punished as hereinbefore provided."

THE REGULATIONS

Pursuant to the provisions of the law above quoted, the following regulations are published and will take effect from and after the 4th day of August, 1910:

Section 1. When at any time during the day or night a vessel, unable to pass under the closed draw-span of any one of the above bridges, approaches it from a distance of over 1,000 feet, the person in command of such vessel shall cause to be sounded, when said vessel shall be at a distance of not less than 1,000 feet, the prescribed signal and shall repeat this signal until it is understood at the bridge.

Section 2. When such vessel is about to leave a landing 1,000 feet or less from the drawbridge, with the intention of passing through the draw, the per-

son in command shall cause the prescribed signal to be sounded at such interval before leaving the landing that the draw may be opened in time for the vessel to pass.

Section 3. The following signals are prescribed for vessels wishing to have the draws opened:

"Oregon Railroad and Navigation Company's bridge." One long blast of whistle, followed quickly by one short blast.

"Burnside Street Bridge." One long blast of whistle, followed quickly by two short blasts.

"Morrison Street Bridge." One long blast of whistle, followed quickly by three short blasts.

"Madison Street Bridge." One long blast of whistle, followed quickly by four short blasts.

For the passage of vessels or water crafts of any description propelled, by other than steam power, like signals shall be given by horn or trumpet, when a whistle is not available.

Section 4. All vessels when passing any bridge shall be moved as expeditiously as is consistent with established rules governing speed in the harbor of Portland.

Section 5. All vessels, crafts or rafts, not self-propelled, navigating the river, for which the opening of any bridge may be necessary, shall, while passing such bridge, be towed by a suitable self-propelled boat.

Section 6. Upon hearing the signals hereinbefore prescribed, the engineer or operator of a drawbridge

shall promptly open the draw, except between the hours of 6:30 a. m. and 7:00 a. m., 7:15 a. m. and 7:45 a. m., and 8:05 a. m. and 8:30 a. m.;

Provided, That the draw shall be promptly opened for the passage of sea-going vessels of 250 tons or over upon the prescribed signal at any hour of the day or night, and,

Provided further, That when any vessel shall arrive at any bridge within five minutes before 6:30 a. m., 7:15 a. m. or 8:05 a. m., it shall be passed promptly through all the bridges in the direction in which it is moving and shall not be stopped between bridges.

Section 7. In case the draw can not be immediately operated when the prescribed signal is given, a red flag or ball by day, and a red light by night, shall be conspicuously displayed.

JOHN C. SCOFIELD
Assistant and Chief Clerk,
For the Secretary of War.

WAR DEPARTMENT,
August 4, 1910.

Section 6 of the foregoing regulations is hereby temporarily modified to read as follows:

Section 6. Upon hearing the signals hereinbefore prescribed, the engineer or operator of a drawbridge shall promptly open the draw, except between the hours of 6:30 a. m. and 7:00 a. m., 7:15 a. m. and 7:45 a. m., 8:05 a. m. and 8:30 a. m., 5:15 p. m., and 5:45 p. m. and 6:00 p. m. and 6:30 p. m.;

Provided, That the draw shall be promptly opened for the passage of sea-going vessels of 250 tons or over upon the perscribed signal at any hour of the day or night, and,

Provided further, That when any vessel shall arrive at any bridge within five minutes before 6:30 a. m., 7:15 a. m., 8:05 a. m., 5:15 p. m., or 6:00 p. m., it shall be passed promptly through all the bridges in the direction in which it is moving and shall not be stopped between bridges.

ROBERT SHAW OLIVER,
Assistant Secretary of War.

WAR DEPARTMENT,
June 15, 1911.

Filed October 28, 1914. G. H. Marsh, Clerk.

CLAIMANT'S EXHIBIT No. 7.

ORDINANCE No. 17591.

An Ordinance defining the duties of Harbor Master, and regulating the Port of the City of Portland; and repealing all ordinances and parts of ordinances in conflict herewith.

"Section 1. That for the better protection of persons passing to and from ships and wharves in the City of Portland, it shall be the duty of every owner, lessee, or proprietor of every dock or wharf, to close, and keep closed when not in actual use, by sufficient gates, barricades, or hatches, all slips or

runways used as a passage-way between the dock or wharf and a ship, and to keep every dock and wharf sufficiently lighted at night when a vessel is made fast thereto."

"Sec. 2. Vessels arriving within the corporate limits of the City of Portland, if obliged to anchor, shall be anchored below the Albina Ferry, and on the west side of the main ship channel; such vessels shall be moored with bower anchor forward and another bower anchor ready to drop, and a stream anchor out astern, to prevent the vessel from swinging across the main ship channel and obstructing the same, and shall have a boat swung out ready for instant use at all times. Vessels moving from the docks or wharves to anchor in the river while waiting for cargo, and shall be moored under the same conditions as other vessels, so as to leave a clear channel for vessels coming up or going down the river. Pilots and masters of towboats bringing vessels to anchorage in the Harbor of the City of Portland, shall see that the vessel in their charge is moored so as to comply with these regulations. Vessels must not be anchored or moored in the fairway channel within the City limits, neither must they moor or anchor within four hundred (400) feet of any bridge or ferry line."

"Sec. 3. Vessels moving from one dock or wharf to another or from one place to another, when necessary to pass through the draw of any bridge or cross the line of any ferry boat, or when moving from a

dock or wharf on one side of the Willamette River to a dock or wharf on the opposite side of said river, shall, in order to prevent the obstruction of travel, have the service of a tug, provided this section shall not apply to vessels when propelled by their own engines."

"Sec. 4. A vessel anchored or moored in the harbor or laying at the dock, must at all times have at least one officer and three seamen on board capable of taking proper care of the vessel. If it becomes necessary, in order to facilitate navigation or the commerce of the port or for the protection of other vessels or property, a vessel may be removed by order of the Harbor Master at the expense of the owner, and the owner and vessel shall be liable for all damages and costs that shall arise thereby."

"Sec. 5. If any vessel be sunk or stranded within the port, or if any obstruction be found to impede navigation within said port, the owner of the vessel or property by which such obstruction is caused, shall immediately notify the Harbor Master of the position of such obstruction, and shall exhibit on or near such vessel or obstruction such flags, masts or lights as the Harbor Master may direct. Two red lights at night and two red flags by day with bell sounded in case of fog."

"Sec. 6. The master or person having the charge or command of any vessel coming to or lying alongside any wharf or vessel berthed at a wharf shall, both before and during such time as such vessel is

moored or stationed at such wharf, or vessel berthed at a wharf, have the anchors stowed, the jib-boom in, the lower yards topped and braced sharp up, and all other projections stowed within the rail of the said vessel."

"Sec. 7. In order to facilitate the removal of vessels from their berths at any wharf or place of mooring, or for other reasons, the Harbor Master may direct the master or person in charge of any vessel to slack away hawsers, cables or other fastenings of any ship, or to have her yards topped or braced fore and aft, and her martingale and jib-boom to be rigged in. The master or person in charge of any vessel shall forthwith comply with such directions given by the Harbor Master."

"Sec. 8. Every vessel lying alongside a wharf, or vessel lying alongside a vessel berthed at a wharf, shall from sunset until sunrise, be provided with proper lights, and shall be provided continuously with such appliances in the way of gangways and manropes as may, in the opinion of the Harbor Master, or in fact, be necessary for the convenience and safety of persons passing to and from such vessels, and every gangway fixed for the purpose of giving the crew or other persons access to the ship after dark shall be brightly illuminated by the best available means as long as such gangway is in communication with the shore, and a watch shall be continually set upon said gangway."

"Sec. 9. Every vessel lying at a wharf shall have such a safety net suspended from a stage or other

appliance that may be rigged for the purpose of facilitating ingress and egress to the said vessel as will prevent persons falling into the water in the event of their slipping off the said stage or other appliance that may be rigged for the aforesaid purpose."

"Sec. 10. Every hawser or rope by which a vessel is made fast to the wharf or shore shall be defended by at least one metal disc of such size and pattern as has been approved by the Harbor Master, and every such metal disc shall, if not affixed to the hawser or rope to the satisfaction of the Harbor Master, be removed to a position on the said hawser or rope pointed out by him, and the ship fended off a distance of six feet."

"Sec. 11. All openings in the ship's side shall be closed at sundown, gangways raised clear of the dock, and all cargo skids shall be unrigged at sundown except during such time as they are actually in use, when they shall be brightly illuminated. Ballast logs when used by ships are to be properly fastened by chains or wire cables in such a manner that they can not float through their fastenings if disturbed by the displacement of water caused by passing steamers."

"Sec. 12. Combustible matter, such as pitch, tar, resin, or oil, shall not be heated on board any vessel lying at anchor in the port, and all combustible matter shall be heated in a boat astern at a proper distance from such vessel: provided, that combustible matter shall not be heated while such vessel is lying alongside a wharf."

"Sec. 13. Oil, spirit, or inflammable liquid shall not be pumped or discharged from any vessel or tank into the waters of the port."

"Sec. 14. It shall be unlawful for goods or cargo to be placed on any street or roadway near or at the approach to any wharf or dock without the permission of the Harbor Master having first been obtained."

"Sec. 15. When loading into or discharging from any vessel, coal, ballast ashes, or any material whatsoever, a good and sufficient tarpaulin shall be so stretched and spread as to effectually pervent any lading or material from falling into the waters of the port."

"Sec. 16. It shall be unlawful for any person upon any vessel or wharf within the port, or upon any street or roadway immediately adjoining a wharf to tout or solicit anyone to proceed as a passenger by any vessel, or to take up his or her residence at, or proceed to, any boarding house or hotel."

"Sec. 17. All stray boats, timber, or other articles found within the port shall be immediately delivered up to the Harbor Master, in whose custody they shall remain until claimed by the proper owners, who shall pay all expenses thereon, including a charge for keeping and storing the same. If such articles are not claimed within a reasonable time, they shall be sold in the manner provided by the Charter for the sale of property."

"Sec. 18. It shall be unlawful for any person to throw, place or leave any dead animal or putrifying matter into or on any part of the port."

"Sec. 19. It shall be unlawful for any person to place or deposit any rubbish, refuse matter, or articles of any offensive character, likely to create a nuisance upon any wharf, or wharf road, or street leading to a wharf, except at the places and in the manner pointed out by the Harbor Master."

"Sec. 20. It shall be unlawful for any person to furiously or negligently ride or drive through, upon, or along any wharf, or near approach thereto, or to drive on the wrong side of the road, or be away from his horse or cattle so as to be unable to have the full control of such horse or cattle."

"Sec. 21. It shall be unlawful to fasten vessels or floating timber to either of the bridges or to any support thereof."

"Sec. 22. It shall be unlawful for any person or persons to bathe from any wharf or in any part of the port which is open to public view."

"Sec. 23 It shall be unlawful for any person or persons, firm or corporation, to dump or deposit or throw or cause to be dumped, deposited or thrown into the Willamette River, within the limits of the City of Portland, any sawdust, slabs, gravel, loose earth or other debris which may tend to obstruct the channel of said river, or to dump or deposit or cause to be dumped or deposited any sawdust, slabs,

ashes, gravel, loose earth, rubbish, or other debris, at any point within the corporate limits of the City of Portland, where the same will be carried away and into the said river, or into or through any sewer within the City limits, by freshets or otherwise."

"Sec. 24. It shall be unlawful to run or propel a steamboat on the Willamette River within the corporate limits at a greater speed than eight miles an hour."

"Sec. 25. The Harbor Master shall have the right to call on the Chief of Police to aid him in the execution of his duties and he shall have full power to arrest any person or persons who obstruct or resist or refuse to obey his legal orders and requirements and bring him or them before the proper court, or courts having jurisdiction in the case, for punishment."

"Sec. 26. The Harbor Master is hereby authorized to enter upon and inspect any vessel to ascertain the kind and quality of merchandise or cargo thereon or her condition in any respect, or the condition of her crew, and no person shall hinder or molest the Harbor Master, or refuse to allow him to enter upon any vessel for any purpose specified in this section."

"Sec. 27. It shall be the duty of the Harbor Master to inspect the harbor frequently, and to report any violation of this or any other City ordinance, or any law respecting the use of wharves, docks,

landings, vessels or harbor, to the proper authorities of the City of Portland, the United States, or the State of Oregon, as the case may be, to be acted upon as provided by law in cases where he is not empowered by this ordinance to act himself."

"Sec. 28. It shall be unlawful for any steamship, vessel, or other water craft to enter the City limits while having on board any blasting powder, gunpowder, dynamite or other explosive compounds used for blasting purposes. But this shall in no wise be construed as to include water craft of any description having any such cargo on board which may be passing up or down the Willamette River to points outside the City limits."

"Sec. 29. No person shall discharge blasting powder, gunpowder, dynamite, or other explosive substances from any vessel or steamship except from ships' sides or tackles, and before the vessel shall have been hauled up to the wharf. No water craft shall be permitted to remain at the wharf longer than twenty-four hours after receiving gunpowder, blasting powder, or other explosive substances on board. All gunpowder, blasting powder, dynamite or other explosive substances deposited on the wharf for shipment shall be immediately passed on board the vessel which is to receive the same."

"Sec. 30. Any person or persons, firm or corporation violating any section of this ordinance or part thereof, or fail to comply with any of its provisions, shall upon conviction thereof in the Municipal Court

of said City, be fined not less than $10.00 nor more than $200.00, or by imprisonment in the City jail for not less than five days nor more than ninety days, or by both such fine and imprisonment."

"Sec. 31. All ordinances or parts of ordinances in conflict herewith be and are hereby repealed."

Passed the Council March 11, 1908.

A. L. BARBUR,
Auditor of the City of Portland.

Submitted to the Mayor, March 13th, 1908.

Approved, March 17th, 1908.

H. LANE, Mayor.

Filed October 28, 1914.

G. H. Marsh, Clerk.

And afterwards, to wit, on the 22nd day of January, 1915, there was duly filed in said Court and cause a stipulation to send original exhibits to Court of Appeals, in words and figures, as follows, to wit:

Stipulation.

It is hereby stipulated and agreed between the parties in the above entitled suit that printed copies of the photographs introduced as exhibits at the trial herein for the apostles on appeal shall not be required, and that an order may be granted by the

above entitled court sending the original photographs introduced as exhibits as aforesaid as a part of the apostles on appeal to the appellate court.

Portland, Oregon, January 1915.

J. A. BECKWITH
of Proctors for Libellant.

SANDERSON REED
Proctors for North Pacific S. S. Co. Claimant.

WALTER H. EVANS,
Proctor for County of Multnomah.

Filed January 22, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on Thursday, the 4th day of February, 1915, the same being the 82nd Judicial day of the Regular November, 1914, Term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Based on the stipulation of all of the parties hereto,

IT IS ORDERED that the appellant be permitted to forward with the apostles on appeal the original photographs introduced as exhibits at the trial herein in place of copies thereof, and the clerk is hereby ordered to omit making copies of the photographs introduced at the trial herein as exhibits and to forward the original photographs introduced as exhib-

its with the apostles on appeal to the appellate court. Dated this 3rd day of Feb. 1915.

R. S. BEAN,
Judge.

Filed February 3, 1915. G. H. Marsh, Clerk.

UNITED STATES OF AMERICA,
DISTRICT OF OREGON.—SS.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have prepared the foregoing apostles on appeal in the case of the Steamship "Yucatan", the State of Oregon, Libellant and Appellee, the North Pacific Steamship Company, Claimant and Appellant and Multnomah County, Respondent and Appelee, in accordance with the law and the rules of this Court and that the foregoing apostles contain a true and correct transcript of the record and proceedings had in said court as the same appear of record and on file at my office and in my custody, as provided by law and the rules of court.

And I further certify that the cost of the foregoing record is $ for Clerk's fees for preparing transcript of record and $ for printing said record, and that the same has been paid by said appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland in said District this day of 1915.

Clerk.

In The United States Circuit Court of Appeals for the Ninth Circuit

NORTH PACIFIC STEAMSHIP CO., A CORPORATION, CLAIMANT OF THE STEAMSHIP YUCATAN,

Appellant,

vs.

THE STATE OF OREGON AND MULTNOMAH COUNTY,

Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.
HONORABLE R. S. BEAN, JUDGE.

Brief of Appellant

SANDERSON REED and C. A. BELL
Proctors for Appellant

A. M. CRAWFORD, Attorney General, and J. A. BECKWITH,
Proctors for the State of Oregon

WALTER H. EVANS, District Attorney, and GEORGE MOWRY,
Proctors for Multnomah County

GREENBAY PRINTING CO.

In The United States Circuit Court of Appeals for the Ninth Circuit

NORTH PACIFIC STEAMSHIP CO., A CORPORATION, CLAIMANT OF THE STEAMSHIP YUCATAN,

Appellant,

vs.

THE STATE OF OREGON AND MULTNOMAH COUNTY,

Appellees.

Upon Appeal From the District Court of the United States for the District of Oregon.
Honorable R. S. Bean, Judge.

Brief of Appellant

STATEMENT OF THE CASE.

This suit was brought by the State of Oregon, libelant, for damages claimed to have been done to a piano on the Steamship Boston and certain damage to the Boston itself by the Steamship Yucatan in the Willamette River at Portland, Oregon, at 12 o'clock noon, March 3, 1914, the Boston being under lease to the State of Oregon as a training ship for the naval militia.

No findings of fact or conclusions of law were made or filed by the court below.

The decree allowed the claim of the State of Oregon for damage to the piano in the sum of seven hundred dollars ($700), and for damage to the Boston in the sum of three hundred and fifty-six dollars ($356), making a total of one thousand and fifty-six dollars ($1056).

After the decree was rendered, the claimant, the North Pacific Steamship Company, filed a motion that the court make and file findings of fact on certain points. (Apostles, p. 31.) This was done with the view that findings of fact if made by the court below would entitle the claimant to a decree under the law applicable to the facts, it not being clear to the claimant under the facts and under the law on what ground the court below relieved the County of Multnomah for negligence in not opening the bridge, and relieved the Boston for negligence in lying in the fairway with the guns projecting.

SPECIFICATIONS OF ERROR IN THE DECREE.

In this appeal the claimant and appellant, the North Pacific Steamship Company, assigns error in the decree in granting the State of Oregon a decree in the sum of $1056, and $132.94 costs and disbursements, or any sum against the Yucatan or the claimant or its stipulators.

And in dismissing the cross libel filed by the claimant against Multnomah County.

And in granting to the said Multnomah County a decree against the North Pacific Steamship Company and its stipulator in the sum of $139.20, or any sum for the costs as attached.

And in not granting to the claimant a decree that it recover of and from the State of Oregon and the County of Multnomah the amount claimed for damages to the Yucatan as pleaded and proven, and the costs and disbursements of claimant incurred herein.

In the absence of findings it is difficult to present assignments of error; nevertheless the attempt has been made, and such assignments of error are found on pages 37-39 of the printed record.

QUESTIONS INVOLVED UNDER THE PLEADINGS.

The second amended libel of the State of Oregon sets forth one allegation of negligence on the part of the Yucatan, to-wit: "That on so moving the said Steamship Yucatan her master, Captain A. C. Poulson, was acting contrary to law, in that he was not a licensed pilot for said river and did not have a licensed pilot aboard said vessel."

It is contended that no other facts are alleged. It is true that the libel says that by reason of carelessness and negligence and unlawful handling of said vessel, and without fault on the part of the Boston, etc., the Yucatan collided with the Boston, etc., and that the Boston's position was legally authorized by the United States engineer, and was also

authorized by the owners of upland on the east, but the claimant points out an absence of facts constituting negligence in the libel. (Apostles, p. 6.) It will be argued that under the law the absence of a licensed pilot is not negligence; that the facts govern, and in the event of the breach of the regulations it must appear that it was the breach of the regulations that caused the damage; that it was a breach of the statute and regulations on the part of libelant and Multnomah County both that caused the damage.

The cross libel of the claimant alleges that the County of Multnomah was responsible for the handling of the bridge, which is admitted by the County of Multnomah.

The cross libel of the claimant with regard to the piano and the damage to the Boston denies the negligence, and denies that the position in which the Boston was moored was authorized by the United States engineers, and will contend that there is no evidence that the engineers authorized her position in the fairway, but only authorized the placing of the dolphin; and further denies that owners of nearby property have any right to authorize the location of the Boston. The cross libel further sets forth that the City of Portland is a municipal corporation and has made the following regulations by ordinance regarding the harbor: "Vessels must not be anchored or moored within the fairway channel within the city limits, neither must they be moored or anchored within 400 feet of any bridge or ferry

line." It is further alleged that there were projecting from the starboard side of the Boston guns to the distance of some ten feet, and that said guns were easily movable.

It is further alleged in the cross libel that there is an ordinance of the City of Portland to the effect that the "master or person having charge or command of any vessel coming to or lying alongside of any wharf shall, both before and during such time as such vessel is moored or stationed at such wharf, have the anchors stowed, the jib boom in, the lower yards topped and braced sharp up, and all other projections stowed within the rail of said vessel."

This ordinance is also admitted.

It is further alleged in the cross libel that the piano was in the only place at which it could receive damage from the outside by the action of one of the guns; in other words, it was placed exactly where the breech of the gun, swinging on its trunnion, could crush the piano against a projection or angle in the skin of the Boston.

The claimant further alleges that it had no knowledge as to the terms of the lease held by the State of Oregon covering the Boston, but the lease was proven at the trial whereby the right of the State of Oregon to make a claim for the Boston was substantiated. The cross libel further shows that the bridges in the City of Portland are subject to the regulations of the Government of the United States and the rules and regulations of the Secretary of War, this regulation having been issued that

"in case the draw cannot be *immediately* operated on the prescribed signal, a red flag or ball by day and a red light by night shall be conspicuously displayed." It is admitted that the bridge did not open on signal and no red flag or red ball was displayed by the bridge.

The cross libel further alleges that the Yucatan signaled once and again for the draw, and the draw not opening, the master then sounded the danger signal, but because the river at that point is about 600 feet wide and the distance from the Broadway bridge to the Globe milling dock is a distance of approximately only 1300 feet, it was unwise for the Yucatan to let go of the line made fast to the Globe dock while the bridge was still shut. The distances are admitted by the answer of Multnomah County to the cross libel, but the County of Multnomah alleges that it was unwise for the Yucatan to stay fast to the Globe dock and on the contrary that it should have let go, and denies the bridge did not open for nineteen minutes after signal, but alleges it was opened fourteen minutes after the signal.

The cross libel of the claimant further (paragraph X, Apostles, p. 15) sets forth the fact showing how the cargo boom of the Yucatan was torn loose by the muzzle of the gun, whereby the cargo boom caught on the canopy of the launch in a cradle on the deck of the Boston, and claims that this damage was due to the gun projecting from the side of the Boston. The cross libel alleges (paragraph XIV,

Apostles, p. 17) that the Yucatan was in charge of a master who was thoroughly competent.

The cross libel of the claimant (paragraph XV, Apostles, p. 17) alleges that the damage to the libelant was caused by its negligence in leaving the Boston in the fairway and in leaving the guns projecting further in the fairway, whereby the gun caused the damage to the piano and to the Yucatan, and the cargo boom was torn loose by the gun and ripped the canopy on the launch. And further that the negligence of Multnomah County in not opening the draw and in putting in a tender or operator not familiar with bridges or electricity, by which the bridge was operated, and not familiar with the river and with the regulations covering the movements of boats and vessels, caused the accident.

The Yucatan claims damage in the sum of $1200.

The answer of the County of Multnomah to the cross libel, after admitting the allegation of the organization of the plaintiff and of Multnomah County, and that the latter operated the bridge, and after admitting the ordinances of the city above mentioned in regard to mooring in the fairway and the projection from the sides of the ships, denies knowledge as to the location of the piano, further admits the government regulation "that in case a draw cannot be immediately operated when the prescribed signal is given a red flag or ball by day or a red light by night shall be conspicuously displayed," and further claims that it is the duty of the person operating the bridge to cause the draw

to be opened without unreasonable delay with reference to the state of traffic, the construction of the draw or lift and the conditions existing.

The claimant contends that there was unreasonable delay, that the bridge could have been opened in one minute to three minutes, and that there was no traffic at the time to embarrass the bridge tender, as shown by their own testimony, and there were no conditions existing which prevented the opening of the bridge. It contends that the delay in opening the bridge was due to the ignorance of the bridge tender.

The County of Multnomah in answer to the cross libel (paragraph VI, Apostles, p. 21) admits that at the time of the second signal the draw did not lift or open, and is silent as to whether the bridge was opened when the danger signal was sounded or not, but admits that the bridge did not open in less than fourteen minutes after the first signal had been given, and also admits that no red flag or ball was displayed to indicate that the bridge would not open. And the said answer further denies that the Yucatan got under way to pass through the bridge at all within less than four minutes after the bridge began to open; in other words, the County of Multnomah admits the bridge did not open on signal given twice, and then in the same sentence "this respondent denies that immediately upon said bridge beginning to open or any less than four minutes thereafter the said Yucatan got under way to pass through said bridge." The respondent admits the distances here-

inbefore mentioned, and denies that it would have been unwise to let go of the line while the bridge was shut and denies any knowledge of all other allegations, and denies that the accident was caused in any manner by the failure of the bridge to open.

The Multnomah County answer denies any knowledge of what took place on the Boston, and in paragraph VIII of cross libel (Apostles, p. 22) denies that the master of the Yucatan was competent in any way to handle that ship. No evidence was introduced to support this denial in the face of the catain's evidence of his experience.

The County of Multnomah, the cross libelant, in the IX paragraph denies that damage was caused by the negligence of the county in not opening the draw or of putting in charge of the bridge a foreman not familiar with bridges or electricity, by which the bridge was operated, and not familiar with the river and regulations governing the movements of vessels, and denies that the damage was caused by any negligence whatever of the County of Multnomah, and denies that the bridge did not open promptly, and denies that the bridge tender or foreman was not familiar with the bridge or regulations or with the river or with the regulations governing the movements of boats or vessels thereon.

The answer of Multnomah County to the cross libel denies the alleged damage of $1200 to the Yucatan, and in paragraph XII further admits that the Yucatan had begun to make her turn when she sounded the first signal, and that shortly after the

first signal the Yucatan began to turn, and that the second signal was given only when she was about 20 degrees off the dock, which may or may not be true, but which we think is immaterial, that is, as to the exact number of degrees making the angle with her side to the dock, and further the answer alleges that traffic over the bridge was extremely heavy, being the hour of noon, whereas the testimony of the bridge tender was that there was very little traffic because it was noon. Further the Multnomah County answer alleges that the bridge had to be cleared of traffic before the draw could be opened, which, as above indicated, is not the testimony of the county's witnesses. And further, that in turning the vessel the captain should have caused the vessel to let go of the line and to get under way as soon as the bow of the vessel reached a point about 100 degrees off the dock, and further that Captain Poulson was not a pilot for the Willamette River or Portland harbor, and that there was no licensed pilot aboard. And further, that the master of the Yucatan was not familiar with the speed or the set of the current or the depth of the water or the character of the bottom of the Willamette River. The claimant, however, will contend from the evidence that the master of the Yucatan was accustomed to landing at the Globe dock frequently, and his testimony and that of the two local pilots shows that he was thoroughly familiar with all the local conditions.

The County of Multnomah further repeats that the captain had no license, was without his license for the Portland harbor, etc., and without knowledge of the local conditions, and that it took the Yucatan fifteen minutes before her bow was 100 degrees off the dock; and further that the bridge was already open for the Yucatan several minutes before the Yucatan, if she had let go of her stern line and got under way for the bridge, would have reached the bridge. In other words, the County of Multnomah says that if she had let go the bridge would have been open before she got there, whereas the accident happened because the bridge was not open, whereby the Yucatan was compelled to keep fast to the dock, and she kept fast to the dock to prevent crashing into the bridge. And the same paragraph sets forth that the Yucatan held to the dock until the bow had reached a point 150 degrees off the dock when she did in fact let go and make for said draw; that Captain Poulson was incompetent to handle the vessel and sounded the danger signal, and further that he was not familiar with the location of the Boston and that he was not competent to handle the Yucatan, and he steered the Yucatan in such a way that she collided with the gun on the Boston.

The claimant wishes to point out that under this answer of Multnomah County the claim is made that if the Yucatan had let go of the dock she would have got through the bridge in safety, and that she let go when she was 150 degrees off the dock instead of letting go when she was at about 90 or 100 degrees

off the dock. This claim might be reasonable if it were not for the fact that the evidence is conclusive on the point that the bridge did not open until after the danger signal.

The County of Multnomah further pleads that the Yucatan went through the bridge, which at the time was fully opened, and that the collision was caused by the neglect of the master of the Yucatan, and that the bridge was open for a period of seven minutes.

The claimant points out that the State of Oregon and the County of Multnomah rely entirely on the fact that the master of the Yucatan was without a Portland harbor pilot, and that his master's license was not endorsed for the Portland harbor, and that this constituted such a condition as to charge all of the expense to the Yucatan.

It is pointed out that as to the State of Oregon the Boston was breaking the ordinance of the City of Portland once in leaving the Boston in the fairway and again in placing the guns projecting from the sides, and further, that the County of Multnomah committed a breach of the statute and of the regulations of the War Department in not opening the bridge on signal and in not displaying a red ball or a red flag to indicate that the bridge would not open.

The claimant will further contend that the matter of the exact comparative location of the Yucatan and the dock at the time the signals were blown is immaterial, as this is a matter of judgment in

the hands of the master alone, and further, that in a crisis or in a dangerous situation the master can not be criticised for any order he gives or move that he makes in the way of protecting his ship against danger.

Photographs accompanying were introduced in the evidence. There is a map (p. 215 of the Apostles) introduced by the libelant. There was also a blue-print at the trial, being an enlargement of the map on page 215 of Apostles, which blue-print, however, was not introduced in evidence, the proctor for the libelant offering the enlargement in evidence (Apostles, pp. 42 to 44), but the court excluded it on the ground that it showed some divergence in details, and the matter was not pressed, the court saying (Apostles, p. 44): "You can mark that later. I understand this (referring to the enlargement) is simply an enlargement of the other plat and does not show the location of the Boston at all."

POINTS AND AUTHORITIES.

Liability of Multnomah County.

Suit in *personam* will lie.

Oregon City Nav. Co. v. Columbia Br. Co., 53 Fed. 551.

City of Boston v. Crowley, 38 Fed. 204.

Admiralty has jurisdiction.

Atlee v. Union Packet Co., 88 U. S. 398; 22 L. Ed. 620.

City held liable for failure to open draw.

Greenwood v. Westport, 60 Fed. 560; 53 Fed. 824.

Etheridge v. Philadelphia, 26 Fed. 43.

And for breach of statute regarding bridge.

City of Boston v. Crowley, 38 Fed. 204.

It is a misdemeanor to unreasonably delay the opening of a draw after reasonable signals shall have been given as provided by regulations.

Act of August 18, 1894, claimant's Exhibit 6, Ap. p. 226.

6 Fed. St. Ann. 793.

28 St. L. 362.

The regulations prescribe that engineer or operator shall promptly open the draw for sea-going vessels over 250 tons at any or all times, day or night.

Regulations of Secy. of War, claimant's Exh. 6, Ap. p. 229.

The bridge did not open for fourteen minutes after signal and displayed no warning flag or ball, and the Yucatan was over 1000 feet from the bridge.

Answer of Multnomah Co., Ap. p. 21.

There were no conditions or facts excusing the failure to open or create any exception to the statute and the regulations.

Testimony of Smith, operator and foreman, Ap. p. 186.

LIABILITY OF LIBELANT, STATE OF OREGON.

The burden rests on the libelant to show that the position of the Boston could not have caused the injury.

Penn. v. Troup, 19 Wallace; 86 U. S. 125; 22 L. Ed. 151.

Ord. City of Portland, claimant's Exh. 7, Sec. 2, Ap. p. 231.

Ord. City of Portland, claimant's Exh. 7, Sec. 6, Ap. p. 233.

The Boston, lying as she was in the narrowest part of the river, shut in by two bridges, is bound to take all precautions necessary, both under the statute and under the maritime law.

Act of March 3, 1899, Chapter 425, 6 & 15; 30 Stat. 1152.

The Georgia, 208 Fed. 643-646.

Regardless of the ordinances of the City of Portland, it is negligence on the part of the libelant to have allowed the Boston to be anchored in the fairway, as she was, between the bridges and in the narrow space.

The Skidmore v. City of St. Lawrence, 108 Fed. 972.

La Bourgogne, 86 Fed. 475.

In these citations fog caused the collision. In the cause at bar the failure to open the draw, a human agency, caused the collision, which would not have occurred if the Boston had not been in a dangerous place, or if, being in a dangerous place, she

had taken in her guns. No damage occurred other than that caused by the gun's position.

The State of Oregon was negligent in allowing the gun on the Boston to project beyond the rail.

The Clover, 5 Fed. Cas. 2908.
The Phoenix, 19 Fed. Cas. 11101.
Price v. The Sontag, 40 Fed. 174.
Hamman v. The Industry, 27 Fed. 767.
McGuire v. Ft. Lee, 31 Fed. 571.

As to the Comparative Liability of the Parties.

When a party is in actual violation of a statutory rule it is a reasonable presumption that the fault, if not the sole cause, was a contributory cause of the disaster. In such a case the burden rests upon such party of showing not merely that its fault might not have been one of the causes or that it probably was not, but that it could not have been.

Yan Tse Ins. Assn. v. Furness, 215 Fed. 863.
The Vancouver, 2 Sawyer, 385.
Pennsylvania v. Troup, supra.

The County of Multnomah was in actual violation of a statutory rule in not opening the bridge or in not displaying a red flag or a red ball to indicate that the bridge would not open and has not shown that this breach of the statute could not have been a cause of the accident.

The Boston was lying in the fairway with guns projecting and the libelant has not shown that this

breach of the ordinances of the City of Portland could not have been one of the causes of the accident.

The absence of a person on the ship holding a local harbor license is neither a crime nor a misdemeanor, although a violation of a statutory rule, and the claimant has shown that this fault could not have been one of the causes of the accident, in which case it may be dismissed from consideration.

Penn. v. Troup, 86 U. S.; 19 Wall. 125-138; 23 L. Ed. 151.

The absence of a local pilot is not negligence.

N. Y. v. Calderwood, 60 U. S.; 19 Howard, 241; 15 L. Ed. 613.

The Charlotte, 51 Fed. 459.

The absence of a lookout is not material where the presence of one would not have availed to prevent a collision.

The Bluejacket, 144 U. S. 371; 30 L. Ed. 477, 478.

Nor is the absence of a licensed engineer negligence.

The Vancouver, 2 Sawy. 383.

As to the number of degrees of the angle of the Yucatan to the dock when she let go her line, any act of a mariner when placed in a position of danger without previous negligence on his part is one in *extremis* and is not a fault.

The Vancouver, 2 Sawy. 385.

Greenwood v. Town of Westport, 60 Fed. 565, 566.

Prinz Oskar, 216 Fed. 237.
City of Paris, 9 Wall. 638.

The master of the Yucatan is not blamed by any one at the trial. Neither libelant's witnesses nor Multnomah County's witnesses criticise the master of the Yucatan. The only charge of negligence against him is in the answer of Multnomah County as to the number of degrees of the ship to the dock, not supported by the evidence.

Under the most unfavorable construction possible of the evidence and admitted facts the claimant contends that damages should be divided.

Atlee v. Union Packet Co., 88 U. S. 389-398; 22 L. Ed. 621.

ARGUMENT.

As to the Bridge.

It has appeared to the claimant that the burden is on the bridge and on the Boston to pay the entire damage to the Yucatan. The libelant in suing has based its claim on the absence of a person having a local license on the Yucatan. In so doing it apparently overlooked the fact that the principle of law invoked against the Yucatan applies more strongly to the breach of the ordinance by the Boston in lying in the fairway and in leaving projections ten feet beyond the rail, to say nothing of the general law on this aspect of the case, and likewise applies more strongly to the operators of the bridge than to the Yucatan.

The County of Multnomah in its pleadings charges that the Yucatan should "have caused such vessel to let go of said stern line and to get under way for said draw as soon as the bow of said vessel reached a point about 100 degrees off of said dock" (Ap., p. 26). In the testimony, however, the County of Multnomah abandoned this position and endeavored to show that the Yucatan was to blame in not keeping fast to the dock in all events, so that the Yucatan might have swung into the Boston gently. This effort was first made through the witness Hilton. (Ap., pp. 144, 145.) In the cross examination of Captain Poulson the district attorney endeavors to show that if the Yucatan had held to the line she would have swung without striking the Boston, to which, however, the captain did not agree, and apparently believing that this position was correct, the district attorney recalled Hilton to show the distances with the idea that the distances would have allowed the Yucatan, holding fast to the line, to have struck the dock without striking the Boston. The Boston is a ship of about 3500 tons gross. The effort was made on page 174 of the record to show in a general way the distances by Mr. Hilton, which resulted in the statement of the proctor for the libelant that the Yucatan would have struck the Boston thirty-two feet aft of the forecastle if she had held to the dock. This claim was promptly abandoned when these conditions became apparent, but on cross examination the witness Hilton, after being repeatedly asked, had to admit (Ap., p. 177) that the Yuca-

tan would have hit the gun on his own figures if the Yucatan had been fast to the dock. Attention is called to the extreme reluctance of this witness to admit the conclusion from his own figures.

No other charge of negligence against the Yucatan is made by the County of Multnomah, no other facts are alleged. There are two answers to these charges.

One is that if the bridge had been opened no question would have arisen, as the Yucatan would have gone through the draw as she ordinarily does. The other is that no question of negligence is pleaded as to the captain's handling of the vessel except as to the number of degrees at which his ship lay to the dock when he let go the line. Up to that point he is not criticised, and after that point he is not criticised. It is apparent to any mind that no individual on the bridge of a ship can tell exactly what the degrees of the angle are in a case like this. In addition the law is that in such a case even if the captain should make a mistake it is not a fault. The authorities have been cited. But the master made no mistake in *extremis* or otherwise.

Two local pilots were called, one by the claimant, Captain Allyn, and one by the County of Multnomah, Captain Pope. Their testimony is shown, and it seems clear to the claimant that their testimony supports every act of the master of the Yucatan in regard to his handling of the ship. The effort was made to cause Captain Pope to state that the mas-

ter of the Yucatan was in error. (Ap., p. 204.) Captain Pope says:

> "A. If the bridge was opening he had a perfect right to let go; if not, he had a right to hold on."

After a few more questions which the claimant thinks support the action of Captain Poulson in the matter the county's witness says finally (Ap., p. 206) in answer to a question of counsel:

> "A. Well, now, I was not there. I am only answering what I would do if there. I would probably let go at 120 degrees, taking chances on doing any damage, as Captain Poulson did."

Captain Allyn, witness for the claimant, on cross examination by the county was pressed to some extent with the idea that he would say 120 degrees was not a proper point at which to let go of the line, and as stated above, Captain Allyn refused to be bound by any absolute figure as to degrees. This was on cross examination; and on direct examination Captain Allyn testified that he had handled the Yucatan himself, and that the handling of the Yucatan by Captain Poulson in this particular instance was in a seamanlike and proper method. We refer to this because there is no iota of testimony supporting the allegation that Captain Poulson was incompetent. On the contrary, the evidence of the witness for the county and of the witness for the claimant is that the Yucatan was properly handled. On cross examination again the district attorney asks Captain Allyn:

"Q. Was it proper for him to have been handling that vessel without a river pilot on board?

A. Yes, anybody can handle their own vessel that wants to.

Q. Don't you know that the law requires him to have a pilot on board?

A. I don't know anything about that.

Q. Why do they have you men employed, the Willamette River pilots, if it is proper for a captain who hasn't a license to handle the vessel?

A. Well, it relieves the master of the vessel."

The facts are that when a local pilot is taken on a steamer the captain of the steamer handles the ship at the dock. Captain Allyn says (Ap., p. 160):

"A. The rule has been the captain takes her away from the wharf and then the pilot takes charge as soon as clear of the wharf.

Q. I mean as a matter of fact the captains who know the harbor handle their own ships, and the call for the local pilots is from strangers who don't know the harbor?

A. Yes, sir, that is the general rule."

We submit that from the questions and answers to Captain Pope and Captain Allyn the view of the Willamette River pilots in regard to Captain Poulson is made clear. He was considered perfectly able to handle the ship in this port. He could have obtained a pilot if he had wanted to without charge (Ap., p. 137), and it is true he should have had his license endorsed. It was endorsed immediately after the accident. He is thirty-five years of age,

has been a master mariner for eleven years and at sea nine years before that, is now master of the Yucatan, previous to that was master of the Elder, running into the same port, and before that of sailing ships. He holds an unlimited master's license for steam and sailing vessels and a local license for the Columbia River bar as far as Astoria, San Francisco, San Pedro and San Diego. (Ap., pp. 118, 119.)

The captain blew a signal for the bridge, it did not open; he blew another signal for the bridge, it did not open, and realizing that in the narrow space between the bridges, where the river is only 600 feet wide prompt action must be taken, he blew the danger signal.

At this time, according to Captain Blair, there was a current of 1.88 knots, which was discovered by throwing a box from the bow of the Boston; timeing it with a stop watch, the interval of the passing of the box was noted and the current figured out. These figures are not criticised, and this is the testimony as to the current.

The wind was about fifteen miles an hour (testimony of Captain Poulson, page 144) and was from the southeast. This testimony is not criticised and stands as the testimony as to the wind and its direction. Also on page 125 Captain Poulson testifies in the same way. In offering the evidence of the monthly meteorological report to show the height of the river to refute the testimony of the witness Gavin that the river was dead low, as he testified on page 76, it appears that the statement was made

by counsel that the wind was northwest. This, however, is apparently a typographical error.

All this time the operator of the bridge, incompetent and not able to take the responsibilities he was endeavoring to assume, was asking the gateman on the bridge what to do. This is a very strong statement, but we submit that it is borne out by his own testimony and by the fact that no excuse whatever is given of the failure of the bridge to open. The foreman's name was Smith, and this testimony is found in his cross examination on pages 183 to 188. Smith says the danger signal was given before he commenced to open the bridge. (Ap., p. 184.)

> "Q. Was the danger signal given before or after you commenced to open the bridge?
> A. Oh, certainly before.
> Q. Given before?
> A. Yes."

We presume it is not necessary to reinforce the claim that the danger signal was blown before the bridge began to open, as this is the testimony of the foreman of the bridge. If any question should be made of it there is the additional testimony of Mr. Wright (Ap., p. 149), who was on the Ainsworth dock immediately across the river, and who looked from his office when the danger signal was blown and the bridge was not open. Likewise Captain Chase, a river man and captain of the steamer Cascades (Ap., p. 153), heard the danger whistle, and the bridge was not open when he looked at it after the danger signal.

Now, the bridge did not open for fourteen minutes according to the admission of the County of Multnomah in its answer. Mr. Smith, the foreman, refused to testify as to the time it opened after the signal was given, and he said "he made his statement, making it one minute longer than what the log in the ship testified to." (Ap., p. 184.) The log is not in evidence, but if the witness meant the allegation in the cross libel he would mean then twenty minutes. However, the answer admits fourteen minutes, and it does not seem important to the claimant whether it was fourteen minutes or twenty minutes if the lack of time, whatever it was, caused the damage, and this we think is shown beyond question, because *the bridge did not open until after the danger signal, and as soon as the bridge began to lift before it was open* the captain put on full steam ahead and threw the stern of the Yucatan to port so that her starboard quarter might clear the gun projecting from the Boston.

Now the time necessary to open the bridge is about one minute after they start, as testified by Hicks, the foreman who succeeded Smith, Smith having been discharged after this accident. (Ap., p. 164.) Likewise Smith says (Ap., p. 185) that the draw opens in about a minute. It is a lift draw.

The County of Multnomah in its answer pleaded that the bridge had to be cleared, and there were conditions making it impossible to open the bridge. This, however, is entirely done away with by Mr. Smith (Ap., p. 181), who says, in answer to a ques-

tion from the county, that there was nothing unusual on the bridge, and in fact that there was less traffic at the noon hour than at any other time. In answer to a question he says:

"A. The traffic is not so heavy, no, sir."

Mr. Hicks, the present foreman of the bridge, says that at any time, the longest time and when crowded and at the heaviest traffic, it takes only two to three minutes to clear the bridge.

"A. Well, it will go from, oh, probably two or three minutes." (Testimony Hicks, p. 164.)

Therefore the statute and the regulations regarding the opening of the draw were broken without reason or excuse by the county. Under all of the facts and claims pleaded by the county the bridge could have been opened in from two to four minutes, and under their admission was not opened for fourteen minutes, in addition to which is the testimony of their foreman that it was not opened for one minute after the time shown by the log of the Yucatan.

We have said this took place because of the ignorance and incompetence of the bridge tender or foreman, Smith, and this we believe can be shown by the testimony.

Smith himself did not want to admit his ignorance or incompetence, which is excusable, but it is shown (Ap., p. 188) that he did not know how to put in a fuse, and that the bridge was once kept closed three-quarters of an hour while he telephoned to one of the gatemen to come and put in a fuse.

This likewise is brought out by the claimant from the testimony of the present foreman, Hicks. On pages 166-170 of the printed record can be found his admissions with regard to the competence of Smith. It is true the court below declared he did not see what it had to do with the case, but it has seemed to the claimant that it has a great deal to do with the case, and if there had been a competent bridge tender the bridge would have opened and there would have been no accident. In addition to this Smith gives no excuse or reason why the bridge did not open. Incidentally Smith testifies against the answer of Multnomah County in saying that the Yucatan was due west when he commenced to open the draw. Of course he has to swear to this or otherwise his testimony that the Yucatan was not ready for the draw would be ridiculous, but this is directly contrary to the allegation of the county's answer that the captain of the Yucatan waited too long to let go, because due west would be about 90 degrees off the dock. (Ap., 147 *et seq.*)

On page 186 of the printed record Smith explains why he did not open the bridge. He makes no excuse and no apology. It is a simple confession of incompetence. He heard the signal. He saw no boats in evidence anywhere, which in itself is a strange statement. He went down from his tower and crossed the bridge actually to the other side of the river along the south side of the bridge and he asked the gateman, and still he saw no boats in sight, yet here was the Yucatan swinging, besides which

the Yucatan is a sea-going vessel, and any one who cannot distinguish the whistle of such a boat from a river boat is in himself incompetent either through deafness or lack of intelligence. He saw then the Yucatan swinging and she gave the second signal, and even then he hesitated about opening the draw. (Ap., p. 186.) He hesitated because he thought the boat was not in position for the draw. He heard both signals and did not open it. Here again the county's allegations in its answer are refuted by their main witness. The county alleges in its answer that the Yucatan did not let go soon enough, and the county's employe, the bridge tender or foreman, claims that the Yucatan whistled too soon and was too ready for the draw and therefore he would not open it.

But as to the position of the Yucatan when she blew her whistle the first time for the bridge there is the testimony of Vineyard, page 107, as follows. He is a witness for the libelant and this is on direct examination.

> "By Mr. Beckwith: About what angle was she from her dock when she blew for the bridge the first time?
>
> A. The angle of about 30 degrees I imagine."

Vineyard was in the mess room when the whistle blew (p. 104), but he was looking at the Yucatan when she blew her second whistle.

> "Q. What angle was she when she blew the second signal?

A. About 100 or 110 degrees—120, somewhere in there, I cannot say exactly.

Q. About what angle was she when the danger signal was sounded?

A. In the neighborhood of 150 or 160 degrees, possibly more; I could not say precisely."

Yet Smith, the foreman of the bridge, says he did not know what boat was going through.

He says after she had blown the danger signal he opened the bridge. To any one having the responsibilities of the immense values of a ship on his hands this seems to be negligence and incompetence, and we therefore submit to the court that in our opinion the negligence of the county in the matter is clear. Another point adds to the evidence of Smith's incompetence. He did not know what the regulations were. He apparently had no idea of the responsibility of his position. (Ap., p. 188.)

"Q. Did you ever read the regulations?

A. No, sir.

Q. You don't know what they were?

A. No, sir."

Other witnesses on behalf of the county were T. C. Conners. He testified as to clearing the bridge (Ap., p. 191.)

"A. Well, I should judge at that time probably a minute and a half or two minutes, something like that, if I recall, maybe not so long."

He is not clear about the whistles, but says the danger signal, if it was blown, was because she was drifting on top of the Boston, and further:

"Q. Why should she drift on the Boston if the bridge was open?

A. That is what I want to know."

We submit there is nothing in the testimony of Conners to substantiate the answer of the county in any respect. It in no wise affects the competence of the master of the Yucatan or otherwise. It rather supports the view of the claimant.

A witness for the county is W. E. Reed, a gate tender on the bridge at the time of the accident. The interesting feature in his testimony is that he did not testify the way he had promised the district attorney he would testify. On page 202 of the printed record is shown the fact that a typewritten statement was obtained from him in the district attorney's office, but on his examination he diverged from this statement, and the county's proctor undertakes to show that Reed is confused and undertakes to impeach his own witness on page 201 by this statement. We submit that his testimony on the stand is more important than his statement in the office of the county, and that his evidence is not valuable for any purpose, for it is plainly erroneous from every standpoint. In the first place he says that the Yucatan went south and put her nose up against the steel bridge. (Ap., p. 197.)

"Mr. Evans: You don't mean the steel bridge?

A. Yes, put her nose up against the steel bridge."

Again (Ap., p. 198):

"A. She kept blowing the danger signal until she hit the Boston.

Q. Commenced when heading—

A. For the steel bridge.

Q. Which way would the boat be headed when headed towards the steel bridge?

A. South.

Q. Well, Mr. Reed, either I am confused or you are, one of the two. The steel bridge is the one the railroad goes over, the Harriman bridge?

A. Yes, sir."

This witness testifies that the Yucatan kept blowing the danger signal until she hit the Boston, and before that that she went south until she touched the steel bridge, which is indicated by the statement of the proctor for the county that the steel bridge is the bridge the railroad goes over and is the Harriman bridge, and it is shown on libelant's exhibit, page 2, the plat in the record, at the left edge of the plat and immediately up-river or south of the Globe Grain and Milling Company dock marked on the plat.

Another witness for the county was Mr. Holman, one of the county commissioners. This accident being a public matter, involving public service on the river, it was thought that the county would not hesitate to state all the facts and let the court decide the case. Nevertheless Mr. Holman, who testifies first that he is a manufacturing stationer (Ap., p. 209) and afterwards states on the same page that

he is county commissioner and admits the employment of men on the bridge, declined to testify as to the time his employee stated in his presence the time that elapsed after signal and before opening of draw.

As to the Boston.

The Boston is a naval training ship and was placed in her present location because of its accessibility to the members of the naval militia. The main damage on the Boston is for the loss of a piano. The State of Oregon brought the fact out in its testimony that it was convenient to the members to have the vessel in a position near the center of the city. This is the reason given for the location of the Boston. In fact, we call attention to the testimony of Harvey Beckwith, chairman of the naval board, on pages 58 and 60 of the record. The naval board paid no attention to the location of the Boston, according to the chairman of the naval board, "as there was plenty of room for half a dozen." We submit that this in itself shows negligence. The board paid no attention, gave no care to the location of the Boston as long as it was in position near the center of the city. In fact, we submit that it appears from the testimony in this cause that the naval board has been of the opinion that it could place the Boston wherever it pleased, regardless of the rights of navigation and commerce.

The river at this point is 600 feet wide, and the Yucatan was about 1300 feet from the Broadway bridge, which is the bridge in question. The Bos-

ton was lying in the fairway, and it is incumbent on her under the law to show that her position could not have caused the injury. Moreover, not only lying in the fairway in the narrowest part of the river between two bridges, the State of Oregon, through its naval board, insisted on pointing the guns ten feet out from the side of the ship. The Boston is 277½ feet long; its largest beam is 42.2 feet. (Ap., p. 46.) The beam does not include the guns as they extend out. The guns project in addition to the beam some eight feet. The Boston's port side lay westward from the east harbor line, that is to say, between the harbor lines and in the fairway 60 feet. (Ap., pp. 43, 115, 116, 72.)

We submit that this alone is negligence under the maritime law, and believe that the conditions surrounding the Boston, in the absence of any ordinance, make it negligence for her to lie in the position she did, and particularly to have the guns projecting. Her position can be seen from the different photographs introduced, claimant's Exhibits 1, 2, 3 and 4. From claimant's Exhibit No. 2 can be seen the distance the guns extend. From claimant's Exhibit No. 3 it can be seen that the guns are in a line with the center of the lift draw and the end of the Globe Milling Company dock. She was moved after the accident. The photographs were taken before she moved.

However, in addition to the care required by an anchored vessel in a narrow space there is an ordinance of the City of Portland, pleaded and admitted,

which requires the master or person having charge or command of any vessel coming to or lying alongside of any wharf, both before and during such time as such vessel is moored or stationed at such wharf or vessel berthed at such wharf, to have the anchor stowed, etc., and all other projections stowed within the rail of said vessel. The libelant no doubt will contend that the Boston is excepted from this ordinance because she is not made fast to any wharf, but we submit that the wording of this ordinance covers ships in the harbor, and under the words "coming to or lying alongside of any wharf" includes and covers the conditions under which the Boston was lying in the harbor. The ordinance says "shall both before and during such time as such vessel is moored" have all projections stowed within the rail of the vessel. We submit that both the wording and the spirit of this ordinance apply to the Boston. The same ordinance provides that vessels must not be moored within the fairway, and yet the Boston was moored in the fairway in the narrowest part of the river. As an answer to this the State of Oregon claims that it had specific permission to anchor in the fairway, to which the claimant replies that it is not aware that any such permission has been shown by the evidence. The claimant has been unable to find an iota of evidence authorizing the location of the Boston in the fairway. The plat in connection with libelant's Exhibit A shows the dolphin, but there is no permission to locate the Boston nor any other ship in the fairway. There is no permit

from the City of Portland for the Boston to lie in the fairway or for her to extend her guns from the sides, nor if such permit were given would it be constitutional. As the evidence shows, the Boston is moved from time to time, and a dolphin that is mentioned was torn out by the Boston. Moreover, under the libelant's exhibit referred to (page 212) it appears that no exclusive privilege is given, that it does not authorize any injury to private property or invasion of local law or regulations, that there shall be no unreasonable interference with navigation, and particularly under paragraph (e) on page 213 of the record that the permission is given for nothing but the particular object named, that is, the dolphin. The libelant takes issue with the State of Oregon that it has any permission or consent to place the Boston where the Boston lay on March 3, 1914, and that under any circumstances whatever permission it had does not authorize the invasion of any local law or regulation, and does not enable the Boston to break the local law and regulations of the city.

There is no evidence whatever that the city consented to the location of the Boston. There is no ordinance offered in evidence or pleaded authorizing the location of the Boston. The fact that the harbor master called at the Boston, the fact that he examined the boat or did this or that around the Boston is no consent. There is no authority given to show that any man named in the evidence had any right to offset the ordinance and regulations of the

City of Portland regarding the harbor. The harbor master was not called to the stand. The fact that the libelant did not call the harbor master shows no consent was given even verbally.

Attention is particularly called to the fact that the State of Oregon in alleging in its libel that it had permission to place the Boston between the harbor lines has made an error. The facts are that the naval board obtained permission to place one dolphin nine feet within or between the harbor lines. Another dolphin was placed further down the stream and outside of or eastward of the harbor line. This dolphin went out and the Boston was then placed as she lay when she was struck. This is shown by the testimony of Hilton on page 41 of the printed record.

Referring to the blue-print attached to libelant's Exhibit E-2, page 215 of the record, the witness says:

> "A. Towards the center of the stream from the harbor line. Then it shows also the other dolphin which was to be driven outside the harbor line, that is, between the harbor line and the shore line, and this—*at that time it was understood the Boston was to moor there*—and this is the permission as I filed it for the naval board.
>
> Q. That blue-print was attached to it at the time?
>
> A. Yes, it was made in quadruplicate and this was one of the copies."

It appears then from the testimony of the witness Hilton that the Boston was intended to lie and

did lie with her bow attached to the dolphin nine feet within or between the harbor lines and her stern fast to the dolphin outside or east of the harbor line. Later this dolphin went out, when the Boston swung out so that she was 60 feet in the channel. And in addition to this her beam is 42 feet. The distance the guns protrude can be seen from the testimony of the witness Hilton on pages 47 and 48 to be eight feet eight inches. Or if the sponson immediately forward of the gun should be considered as a protection for the gun, although not a part of the beam of the ship, then the gun would extend five feet beyond the extreme side of the Boston.

Moreover, the libelant stated through its proctor that no permission was being shown by the libelant to locate the Boston where she was located. On page 42 of the printed record appears the following:

> "Mr. Beckwith: We are merely offering to show he had permission to drive piling."

It is contended by the claimant that this has been shown, and no more has been shown than has been claimed by the statement of the proctor for the libelant in open court, to-wit, that only permission to drive the piling was shown, and it never was intended to leave the Boston in the fairway.

The Boston was moved after the accident. She was dropped down, as they call it, seventy or forty feet. (Ap., p. 74.)

As to the damage, an interesting feature in this cause is that not a dollar's worth of damage was done except by the gun on the Boston.

The gun crushed the piano, which was carelessly placed between an elbow or angle in the skin or iron side of the Boston and the heavy butt of the six-inch gun. When the gun swung on its trunnion, as it was intended to do and left to do, it crushed the piano against the skin of the Boston. If the piano had been even loose or had been in any other place on the ship it could not have been hurt; but it could not possibly escape if any river boat or any boat proceeding to the north and exerting any force could have touched the muzzle of that gun. The damage to the gun's shutters on the Boston was done by the gun. The damage to the canopy of the launch on the deck of the Boston was done by the gun. The cargo booms on the Yucatan were all fast, and the cargo boom in the stern of the Yucatan was held in place by tackle fast in bolts on the side of the Yucatan. The gun caught in one of these tackles or ropes, tore out the bolt, let the cargo boom fly, and the cargo boom or a hook on the end of the tackle caught in a stanchion on the canopy of the Yucatan and did whatever damage was done. If the gun had not been projecting the cargo boom could not have got loose.

The gun damaged the Yucatan. It entered the deadlight in the saloon or dining room of the Yucatan, slipped from there to another deadlight and from there to a third deadlight, cracked and tore the plates and scraped the side of the vessel for some distance. It was pleaded that to replace these plates will cost $1200. The evidence of Mr. Ore-

willer of the Portland Iron Works is that it would cost $3250.

Captain Blair of the naval militia says that it is against the custom to train these guns aft, although this was done for a while. There is nothing in the evidence to show that these guns could not have been moved or withdrawn so that they would not present an obstacle to navigation. There is no law nor regulation, according to Captain Blair's testimony, which requires the guns to be kept in the position in which they were.

The claimant submits:

1. That the proper signals for opening the bridge were given;

2. That no attention was paid to the signals and the bridge did not open;

3. That the danger signal was blown and the bridge did not begin to open until after the danger signal was given, after the signal for the bridge had been sounded twice;

4. That no excuse for the delay is shown and no sign or warning was given by the bridge that it would not open;

5. That this is a case of gross negligence on the part of the bridge and Multnomah county; and

6. That it was the delay which caused the contact between the Yucatan and the Boston;

7. That no damage whatever would have happened to the Boston or any property on board the Boston or the Yucatan if the gun on the Boston had not been projecting;

8. That there could have been no possible damage to the Boston or possibility of collision if the Boston had been out of the fairway at the narrowest part of the Portland harbor, to-wit, 600 feet;

9. That no negligence on the part of the Yucatan is pleaded excepting as to the angle at which she took in the line, which is not proven and which in any event is a matter of judgment in *extremis.*

The claimant therefore prays that a decree be entered against the County of Multnomah and the State of Oregon in favor of the Yucatan for twelve hundred dollars ($1200) and interest to cover its loss.

SANDERSON REED and

C. A. BELL,

Proctors for Claimant.

2578

In the United States Circuit Court of Appeals for the Ninth Circuit

NORTH PACIFIC STEAMSHIP COMPANY,
a corporation, claimant of the
Steamship Yucatan,
Appellant,

vs.

THE STATE OF OREGON AND MULTNOMAH
COUNTY,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.
HONORABLE R. S. BEAN, JUDGE.

Brief of Appellee, State of Oregon

SANDERSON REED and C. A. BELL
Proctors for Appellant

GEO. M. BROWN, Attorney General, and J. A. BECKWITH,
Proctors for the State of Oregon

WALTER H. EVANS, District Attorney, and GEORGE MOWRY,
Proctors for Multnomah County

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Brief of Appellee, State of Oregon

STATEMENT.

The case arises out of the collision of the Steamship Yucatan with the United States Ship Boston in the Willamette River March 3rd, 1914. The Boston was lying at her mooring on the east side of the Willamette River at the foot of Clackamas Street. The Yucatan was lying at the Globe Milling Company dock to the south of the Boston. Both vessels were facing south or up stream. Their location can be determined by a reference to the map. The evidence shows that the Boston was secured to a dolphin and that her position was as

close to the east bank of the Willamette River as possible, and within the line drawn as an extension of the dock line of the Globe Milling Company dock toward the Broadway bridge. The Yucatan, at about the noon hour, attempted to leave the Globe Milling Company dock and pass through the Broadway bridge which is down stream, or to the north of both vessels. A 1.88-mile current was running and at this part of the river set in toward the Boston. The main channel of the stream was to the west of the position of both vessels. The after starboard quarter of the Yucatan struck the starboard bow of the Boston and was swung in so that she struck the six-inch gun which is just aft of the forecastle of the Boston, forcing the gun into battery and throwing it over against a piano, causing damage to the gun, the piano and the inner skin of the ship. At the same time a cargo boom of the Yucatan swung loose and caught the canopy of the steam launch of the Boston which was in its cradle on the "top side" and ripped the canopy off, causing damage also. When the Yucatan struck the Boston it forced her over against the dolphin to which she was fastened on the port side of the forecastle, forcing the Boston up against the dolphin and breaking a large swinging boom which was secured to the side of the Boston. The Yucatan then passed on down the river through the Broadway bridge. The master of the Yucatan was operating his vessel while not being a licensed pilot or having a licensed pilot aboard.

The U. S. S. Boston was under lease to the State of Oregon by the Navy Department and was being used as the training ship for the Oregon Naval Militia. The damage to the Boston and the property thereon was as follows:

Destruction to the piano, total loss.....$700.00
Damage to the U. S. S. Boston, her apparel and furniture $356.00

The Yucatan filed a cross-libel claiming the damage to plates on its starboard quarter amounting to $1200.00. The cross-libel was filed by the North Pacific Steamship Company, owner of the Yucatan, and was against the State of Oregon as lessee of the Boston on the ground that they claimed the Boston was lying in the fairway channel as an unlawful obstruction to navigation, and was also filed against the County of Multnomah on the ground that the Broadway bridge did not open in time to allow the Yucatan free passage, thus causing her to swing around and strike the Boston and causing the damage. The State of Oregon prevailed in the District Court and recovered the entire amount of the damages claimed.

The foregoing statement of the case is inserted in this brief for the reason that appellant's brief does not give a full statement of the case.

ARGUMENT.

AUTHORITIES.

Note 42. An inevitable accident which will exonerate a vessel from liability does not mean an

accident which is unavoidable under any circumstances, but one which cannot be prevented by the exercise of ordinary care, caution and maritime skill. The Blackheath, 154 Fed. 758, Bailey vs. Cates, 23 Can. Sup. Ct. 293 (affirming 11 Brit. Col. 62).

A presumption that the vessel has been guilty of negligence causing the collision arises not only from the breach of a rule of navigation but from any deficiency shown in the management and equipment of the vessel. The same presumption arises in favor of a vessel at anchor as against one running into her. 7 Cyc. 396.

The rule that a moving vessel is presumably in fault for a collision with one at anchor and without fault and can only exonerate herself by showing that the collision was the result of an inevitable accident, applies with greater force to a collision with a stationary object fixed in the land, such as a beacon or pier. (The Blackheath, 154 Fed. 758; Penn. R. Co. vs. Ropner, 105 Fed. 397). The burden rests upon the vessel under way in such a case, in order to exonerate herself from liability, to show that it was not in her power to prevent the injury by adopting any practicable precautions. The Rotherfield, 123 Fed. 460, 36 Cyc. p. 178.

Anchored Vessels. Presumption.

Where a steamer in motion collides with a vessel properly anchored, the presumption of fault is upon the former. The Rockaway, etc., 19 Fed. 449.

Same—Case Stated.

Where a ferryboat R., running from Hunter's Point to Seventh Street, New York, her usual course being near where the Bark S. was anchored off Nineteenth Street, was overtaken after leaving Hunter's Point by a sudden squall of thick snow, and on passing Twenty-third Street was embarrassed by one of the ferryboats of the Twenty-third Street line crossing her bows, compelling her to stop and back, and while so doing, and being headed well toward the New York shore, she drifted down with a strong tide and ran afoul of the S. at anchor, the position of the latter being previously well known to the R. *Held*, that the ferryboat was in fault for not keeping further away from the known situation of the S; *Held* also, that under the circumstances it is not probable that the ringing of a bell would have been of any service to the R. in avoiding the collision and that R. accordingly was alone answerable. The Rockaway, 19 Fed. 449.

A presumption of negligence arises against a steamboat from the fact of a collision with a moored vessel, and imposes on the steamboat the burden of exonerating herself of exculpatory facts. The Dean Richmond, 107 Fed. 1001.

One navigating a stream is liable for running into a wharf and injuring it, although it constitutes a public nuisance, where he might have avoided it with reasonable convenience, as one cannot abate a public nuisance in a highway or navigable stream if he can avoid it with reasonable convenience by passing around it. Dimes vs. Petley, 15 Q. B. 276, 19 L. J. Q. B. N. S. 449, 14 Jur. 1132.

Care must be taken in moving about harbors and other crowded places, to avoid injury to vessels properly moored. The Martino Cilento, 22 Fed. 859.

A steamer must, in general, avoid a boat at anchor, even though the anchorage be in the line of navigation. Knowlton vs. Sanford, 32 Me. 149, 52 Am. Dec. 649.

"Every coastwise sea-going steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats." U. S. Rev. Stat. 4401.

"The boards of local inspectors shall license and classify the masters, chief mates, and second and third mates if in charge of a watch, engineers, and pilots of all steam vessels, and the masters of sail vessels of over seven hundred gross tons, and all other vessels of over one hundred gross tons carrying passengers for hire. It shall be unlawful to employ any person or for any person to serve as a master, chief mate, engineer, or pilot of any steamer or as master of any sail vessel of over seven hundred gross tons or of any other vessel of over one hundred gross tons carrying passengers for hire who is *not licensed* by the inspectors; and anyone violating this section shall be liable to a penalty of one hundred dollars for each offense." U. S. Rev. Stat. 4438.

AS TO APPELLANT'S AUTHORITIES.

Referring to the cases which claimant cites under the heading "Liability of Libelant, State of Oregon."

In the case of The Pennsylvania, 86 U. S. 136, the Court says:

"Concluding then, as we must, that the bark was in fault, it still remains to inquire whether the fault contributed to the collision, whether in any degree it was the cause of the vessels coming into a dangerous position. It must be conceded that if it clearly appears the fault could have had nothing to do with the disaster, it may be dismissed from consideration. The liability for damages is upon the ship or ships who caused the injury. But when, as in this case, a ship at the time of the collision is in actual violation of statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute."

Section II of Ordinance No. 17591 of the City of Portland provides that vessels must not be anchored or moored in the fairway channel within the city limits and neither must they moor or anchor within 400 feet of any bridge or ferry line. The Boston was not anchored within the fairway channel nor within 400 feet of any bridge or ferry line.

Section VI of the same ordinance provides that the master of any vessel coming to or lying alongside any wharf or vessel moored at a wharf shall

have all projections stowed within the rail of the vessel. This does not apply to the Boston for the reason that she was not alongside of a dock or alongside any vessel moored at a dock. By referring to the map of the harbor it will be seen that the Boston was lying as close to the rock bank of the east shore of the Willamette River as possible. She was within a line drawn from the corner of the Globe Milling Company dock to the bridge and away to the east of the fairway or channel used by vessels passing up or down the river. There is nothing to show that the Boston was violating any ordinance of the City of Portland or any statute of the United States.

The Act of March 3rd, 1899, Chapter 425, 30 Statute 1152, provides that it shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such manner as to prevent or obstruct the passage of other vessels or craft. In the case of The Georgia, 208 Fed. 636, the Court said:

"Whether a vessel is so anchored as to prevent or obstruct the passage of other vessels, in violation of Act March 3, 1899, Chapter 425, Sec. 15, 30 Statute 1152, must be determined by looking not alone to the chart and geography of the situation but also to the weather conditions and to the usual course of vessels using the thoroughfare. A vessel so anchored as to leave room for the passage of vessels on either side may not be an obstruction in clear weather when an approaching vessel would have abundant time to avoid her by a change of course but may be an obstruction within the statute when there is a thick fog and she lies in the compass course of passing vessels."

The collision in question occurred on a rainy day but in broad daylight at the noon hour and the Boston was not lying in the navigable channel or lying in the compass course of passing vessels. The Georgia case was one in which the vessel which was struck was anchored in the ship's channel in a thick fog.

In the case of the Skidmore vs. City of St. Lawrence, 108 Fed. 972, the Court says:

"A steamship anchoring in New York harbor outside of the anchorage grounds, where the depth of water was so great as to indicate that such anchorage ground was considerably nearer the shore, is guilty of negligence, so as to be equally liable with the tug colliding with it in a foggy night."

In the Skidmore case the damages were divided as both vessels were found to be in fault. The collision occurred in a thick fog and at night.

In the case of the La Bourgogne, 86 Fed. 475, it will be noted that the collision occured in dense fog. The vessel was anchored in the track of vessels seeking anchorage and knew that she was in the channel. The Court held that she was in fault if another vessel, acting in a prudent manner, seeking anchorage in the customary and appropriate ground ran into her.

Captain Paulsen of the Yucatan (Page 135 Apostles) testified that he had taken his vessel in and out of this same position five or six times prior to this date. All this time the Boston had been at her anchorage inside of the dock line and Captain Paulsen knew of her location and that the guns were

in the position in which they were. He also testified that he had noticed the tendency of the bridge to be slow in opening because he had trouble with it several times before but never as serious as this. As shown by the testimony of Hilton (Apostles, page 49) the six-inch gun only extended about five feet beyond the extreme side of the Boston and it is plain that a prudent navigator would never allow his vessel to come that close to another vessel.

In the cases of The Clover, 5 Fed. Cas. 2908, The Phoenix, 19 Fed. Cas. 11111, and Price vs. the Sontag, 40 Fed. 174, it will be noted that the facts are entirely different from the case at bar. In these cases the vessels were in close proximity with only a few feet to spare. In the case at bar the Yucatan's master had over 600 feet to the west of the Boston in which to maneuver and the Boston was not in the course which a vessel could take from that dock to the draw of the Broadway bridge.

In the cases of Hammon vs. The Industry, 27 Fed. 767, and McGuire vs. Ft. Lee, 31 Fed. 571, the collisions occured at night and both vessels were found to be in fault. In the case at bar the collision occured in daylight, when the Boston was lying away to the east of the channel or course which could be used by the Yucatan. The position of the Boston was known to the master of the Yucatan before he started to leave the dock. The Boston was not violating any statute or regulation but the Yucatan was being operated in violation of law by a person who was not a licensed pilot.

In citing cases appellant has cited cases of fact almost entirely. In admiralty practice a Court cannot decide questions of fact by referring to precedents. A state of facts in one case may justify finding that a vessel is in fault while in another case the facts may be almost identical and the vessel excused from fault. In libellant's brief it is intended to cite authorities which declare principles of law which may apply in this case.

Referring to claimant's comment as to the comparative liability of the parties. There has been no showing that the Boston was in any manner violating any statute or custom but it is not controverted that the master of the Yucatan was acting without the license which is required by statute. In the last three cases cited on page 16 of claimant's brief it will be noticed that both vessels were under way. These cases would involve different principles entirely from the case at bar. They involve the violation of the Acts of Congress for the prevention of collisions and do not apply where one vessel is at anchor.

Referring to the case of Penn. vs. Troup, 86 U. S. 19 Wall. 125-138, 23 L. Ed. 151; N. Y. vs. Calderwood, 60 U. S. 19 Howard, 241; The Charlotte, 51 Fed. 459; The Bluejacket, 144 U. S. 371; The Vancouver, 2 Sawy. 383; it will be noted that these cases hold that the acts of certain persons aboard the vessel not holding a license required by law is not negligence *per se*. This is admitted and the fact that the master of the Yucatan was without

a pilot's license is not negligence *per se* but the fact that he handled his vessel in such a manner that it came into collision with a vessel lying at anchor throws a presumption of negligence onto him and this presumption cannot be removed by the claimant showing some fault or negligence on the part of the Boston.

In the case of Greenwood vs. Town of Westport, 60 Fed. 565. This is a case where a bridge was not opened in time to allow a barge to go through and when the barge finally did get through the tide had gone down so that she struck on the bottom. The master had no license but the Court held that that could not in any manner contribute to the cause of the accident. The position of the Yucatan was not one in extremis as it has been clearly shown by the evidence that the collision was caused by poor seamanship on the part of the master. The trial judge, in his opinion, said that he was of the opinion that the injury was due to the fact that the master was not familiar with the current and winds of the harbor and that on account of the want of his knowledge of these two facts he did not let off the spring line soon enough and therefore caused the collision.

In the case of the Prinz Ozkar, 216 Fed. 237, the Court held that the schooner was not in fault and that the steamship was in fault for the failure to keep out of the way as required by International Law. In this case the collision was caused by the steamer keeping her course and her officers being

off of the bridge figuring out another course and not looking where they were going. The sailing vessel maintained her course and speed and the collision occured.

In the case of the City of Paris, 76 U. S. 634, the Court held:

"1. The rule declared in the preceding cases as to the obligation of larger vessels moving in a crowded harbor, like New York, to move slowly and to keep themselves under such entire control as to be able to stop on short notice, declared anew.

"2. Such steamers should keep a vigilant look-out and if they enter narrow passages, between other vessels, do so only when they plainly see that they can proceed through them without danger to other vessels. If notwithstanding all their caution and vigilance they see any vessel approaching, so as to make a danger of collision, they should stop and reverse their engines as soon as possible."

This was a collision between a sailing vessel and a steamer, both of which were under way.

The case of Atlee vs. Packet Company, 88 U. S. 396, appears to be more in favor of the libelant than the claimant. In this case the Court said:

"The character of the skill and knowledge required of a pilot in charge of a vessel on the rivers of the country is very different from that which enables a navigator to carry his vessel safely on the ocean. In this latter case a knowledge of the rules of navigation, with charts which disclose the places of hidden rocks, dangerous shores, or other dangers of the way, are the main elements of his knowledge and skill, guided as he is in his course by the compass, by the reckoning, and the observations of the heavenly bodies, obtained by the use of proper in-

struments. But the pilot of a river steamer, like the harbor pilot, is selected for his personal knowledge of the topography through which he steers his vessel.

"It may be said that this is exacting a very high order of ability in a pilot. But when we consider the value of the lives and property committed to their control, for in this they are absolute masters, the high compensation they receive, and the care which Congress has taken to secure by rigid and frequent examinations and renewal of licenses, this very class of skill, we do not think we fix the standard too high."

The Atlee vs. Packet Company case is not analogous to the one at bar for the accident occured at night when the pilot of the steamer had no opportunity to see what he was running into. In the Yucatan case the pilot could see everything before he cast off his line, even before he started to leave the dock. The Court declares the reason for the statutes requiring pilots to be licensed and the trial judge was correct in his finding that the cause of the collision of the Yucatan with the Boston was because of the lack of a licensed pilot aboard the Yucatan.

Following Rule 59 as interpreted in O'Keefe vs. Staples Coal Company, 201 Fed. 145, if the Court finds Multnomah County solely liable for the damage to both vessels the State of Oregon could be given a decree against the County of Multnomah for the amount of its damages and costs even though the State did not make the County a party to its original libel.

ARGUMENT AS TO THE FACTS.

There are no points of law disputed and this case is appealed on questions of fact only. The only question involved is as to which party is in fault.

The State of Oregon blames the Yucatan for colliding with the Boston and submits that the evidence shows the accident to have been caused by the inexperience and poor seamanship of the *unlicensed* master of the Yucatan.

The North Pacific Steamship Company blames the County of Multnomah for failure to open the bridge promptly and the State for anchoring the Boston (as they claim) "in the fairway channel."

The County of Multnomah being brought into the suit by cross-libel filed by the North Pacific Steamship Company claims that the bridge was opened within a reasonable time and denies that the bridge was the cause of the collision.

The Boston was placed in its position by arrangement with the U. S. Army Engineers and the local Harbormaster. (Ap. pp. 40, 57, 62). The testimony shows that the engineers knew the piling was to be placed in this part of the river for the purpose of mooring the Boston and the Harbormaster helped measure out the place. The Boston was moored as close to shore as possible. (Ap. 75).

It must be conceded that any vessel, small or large, is an obstruction to navigation to a certain extent, whether at anchor or under way. The question as to the Boston is whether she was "an unlawful obstruction to navigation."

The Boston was not violating any statute of the United States or ordinance of the City of Portland. Section VI of the city ordinance only applies to vessels moored at a wharf. The Boston was moored away from any wharf and away from the channel or fairway. Her position could not cause injury to any other vessel unless such vessel be negligently navigated out of the channel which at this part of the river is certainly wide enough for a vessel of the size of the Yucatan to maneuver.

If the channel were so narrow as claimant says to make it hazardous to navigate the Yucatan it was their duty to take extra precaution such as having the assistance of a tow boat.

The terms "fairway" and "channel" seem to have been confused in this case. Cyc. defines "fairway" as "Water on which vessels of commerce habitually move, a clear passage way by water." Bouvier defines "channel" as "The bed in which the main stream of a river flows and not the deep water of the stream. The main channel is that bed of the river over which the principal volume of water flows. 31 Fed. 957."

The terms are often confused but it will be seen that in the part of the Willamette River where the collision occured, the fairway, or usual roadway for vessels, is far to the westward of the Boston's anchorage. Any vessel at anchor in a river like the Willamette must necessarily anchor in the channel to get deep water, but not necessarily in the fairway.

The gun which was struck by the Yucatan was in the position required by the structure of the Boston. Vessels of war must have guns which project from their sides and vessels of the older types like the Boston are not built to enable them to give sufficient radius to their guns to have them flush with the side of the vessel. Captain Blair testified (Ap. 91) that this gun was in its proper position. In any event it did not protrude over five feet from the extreme outside of the Boston. Ensign Hilton testified (Ap. 47 to 50) that a sponson was six feet forward of the six-inch gun and that the gun extends five feet further from the side than the sponson. The sponson, which is the extreme side of the Boston, extends three feet eight inches. The six-inch gun just aft of the sponson extends eight feet eight inches from the side of the ship but only five feet beyond the sponson.

The position of the Boston is drawn to scale according to the testimony. Ensign Hilton was familiar with the exact position and testified (Ap. 46-50) that the Boston's bow was secured to the dolphin.

The dolphin was 139 feet from the nearest corner of the Globe dock.

The bow of the Boston was 71 feet from the nearest corner of the Globe dock (Ap. 173).

The Boston was 277½ feet long and 42.2 feet beam. The point where the vessel is widest is where the forecastle meets the superstructure.

The outermost point of the Boston as Gunners Mate Gavin testified (Ap. 115-116) was 66 feet from the harbor line. The Boston tapers from the midship line to six feet at the stern.

This evidence is positive and not a matter of opinion and definitely locates the Boston inside the line drawn as an extension of the Globe dock.

The witness Gavin testified (Ap. 66) that a person standing on the starboard gangway which was on the river side of the Boston could see "up straight along the Globe Milling dock" and that the Boston was inside or towards the shore from the extension of the position of the Yucatan at her dock.

While the fairway was to the west of the Boston, the current here followed the east shore on account of the turn of the river and as Captain Blair testified (Ap. 89) was of the speed of 1.88 knots and at this point set in toward the Boston. The Yucatan in getting away from the dock was carried by the current so that her after starboard quarter struck the Boston first on the center of the bow and scraped along the starboard side doing the damage. (Vineyard Ap. 103-105). The Yucatan could not get far enough out in the stream and first raked the piling on the dock.

At the moment of casting off the Yucatan was 120 degrees off the dock, the line being shown in the map in this brief. This shows clear negligence as that placed her broadside to the current, making it impossible to prevent the collision.

When the Yucatan struck the sponson she left splinters from her rail on the sponson, as shown by the photo in evidence.

In getting away from the Globe dock the captain of the Yucatan should have done one of two things.

First—Let go his lines and get out into the fairway when his vessel had sufficient room to pass all other vessels or structures above or below along the shore.

Second—If his vessel got into a position whereby damage might be committed by letting go the lines, he should have held on and let his vessel swing up against the dock.

A vessel which gets broadside to the current is sure to go with the current unless she has way enough to counteract the current. When the Yucatan got 120 degrees off the dock she was broadside to the current and was not under way and in the short space could not get under enough way to counteract the current.

Captain Paulsen (Ap. 128) said the proper thing to do when he got into that position was to hold on and swing up against the dock, but he saw the guns on the Boston and was afraid of them. The reason for this being the proper thing to do was because a straight contact would cause less damage than a scraping contact.

If he had hung on and swung alongside the Boston practically no damage would have been done. The Yucatan would only overlap the Boston 97 feet (Hilton Ap. 176). The gun was 85 feet aft of the

bow. This would make the Yucatan opposite the gun at a point on the Yucatan 12 feet from its bow. The bow of the Yucatan is sharp and there would certainly be very little, if any, damage done by such a contact.

This Court has held repeatedly that cases on appeal in admiralty as to facts, will not be reversed unless clearly against the evidence. The Samson, 217 Fed. 244; The Bailey Gatzert, 179 Fed. 44.

The only question involved in this appeal is as to who is in fault. The trial court heard the witnesses and placed the entire blame on the Yucatan.

It is respectfully submitted that the judgment and decree of the District Court should be affirmed.

GEORGE M. BROWN, *Attorney General,*
and J. A. BECKWITH,
Proctors for State of Oregon, Appellee.


W R & N. Co.
Property
Future Dock Development
Office OWR&N Co.
2 Story
Brick & Steel
Platform
AINSWORTH DOCK
Incline
Elev. Upper 29½
Lower 17½
2 Story Frame
Open
enclosed
Harbor Line
WILLAMETTE RIVER
Extension of G.M.E.Co's Dock Line 7
Harbor Line
55' Inclination headed S. 123° off from Dock 6
205' Clearance
120'
Shed
Elev 28'
S.P. Dock
1 Sty.
GLOBE GRAIN & MILLING Co.
S.P. Dock
Lower 45'
Upper 45'
2 Sty. Fr.
DOLPHIN
U.S.S. BOSTON
42' Beam
DOLPHIN
194
MARGIN
CROSBY
LARRABEE
HALSEY
MULTNOMAH
CHERRY
BROADWAY
CLACKAMAS
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In the United States Circuit Court of Appeals

For the Ninth Circuit

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Appellant,

vs.

THE STATE OF OREGON AND MULTNOMAH
COUNTY,
Appellees.

Upon Appeal From the District Court of the United States for the District of Oregon.
HONORABLE R. S. BEAN, Judge.

Brief of Appellee, Multnomah County

SANDERSON REED and C. A. BELL
Proctors for Appellant

GEO. M. BROWN, Attorney General, and J. A. BECKWITH,
Proctors for the State of Oregon

WALTER H. EVANS, District Attorney, and
GEORGE MOWRY, Deputy District Attorney,
Proctors for Multnomah County.

A. E. KERN & CO., PRINTERS

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STATEMENT OF THE CASE.

On the third day of March, 1914, about noon, the Steamship Yucatan was lying alongside of the Globe Milling Company's dock on the east side of the Willamette River, at Portland, Oregon, and was tied up to this dock by means of a number of stern lines and head lines and was headed south or up-stream. The Willamette River at that point runs north and is about 600 feet in width. The north end of the Globe Milling Company's dock is 1300 feet south of the Broadway Bridge, which is a draw-bridge across the Willamette River. The

Yucatan was lying with her stern at a point 40 feet south of the north end of the Globe Milling Company's dock. (Ap. p. 173.) The Yucatan is 336 feet in length (Ap. p. 122) and has a tonnage of 3500 gross tons. (Ap. p. 120.) At the time in question the U. S. S. Boston, which is a vessel 277½ feet in length (Ap. p. 46), was lying in the Willamette River north and east of the Yucatan. The Boston was also headed up-stream and her bow was 71 feet north from the north end of the Globe Milling Company's dock (Ap. p. 50).

At the time above mentioned, the master of the Yucatan wished to leave the Globe Milling Company's dock, and to take the vessel down-stream through the Broadway Bridge. He accordingly attempted to turn the Yucatan around and to steer her bow-first through the bridge. The manner in which the master of the Yucatan undertook to leave the dock with the vessel is as follows:

A few minutes before the vessel was ready to leave, the captain put out a stern spring line from the offshore quarter on the starboard side of the vessel and ran this line around the stern and up the dock to a cleat on the dock about 150 feet south from the stern of the vessel, or about amidships; then he cast off all the lines except this stern spring line and started the engines slowly and kept this stern spring line tight, and this started the bow of the vessel swinging away from the dock. All the while that the vessel was swinging, the stern spring line was kept tight and this,

of course, drew the stern of the vessel up the dock.

This method that was employed by the master of the Yucatan in leaving the dock is well illustrated by his own testimony, as follows:

"A. That is the position the ship would be in when tied up to the dock; laying alongside of the dock, we have a line out from this quarter in here.

"COURT: A stern line.

"A. And another short line from here and in here—either way we can get hold of the dock —what we call our stern lines. Ahead here, we have a line from here, leading down this way, and another line leading up this way, our head line. When we get ready to leave, we run our stern spring from our offshore quarter.

"COURT: That is on the starboard side of the boat?

"A. That is on the starboard side of the boat, sir; up as far on the dock as we can, just about midships, I should judge about 150 feet, and heave this well tight on the capstan, steam capstan on the deck." (Testimony of Capt. Paulsen, Ap. pp. 122, 123).

"Q. About where is that cleat or cavel on the dock? How far towards the Steel Bridge from the usual place?

(N. B.—The Steel Bridge referred to in this question is the draw-bridge just south of the Globe Milling Company's dock.)

"A. I don't know how long the dock is, but I should judge about 150 feet up the dock.

"Q. How long is the Yucatan?

"A. 336 feet.

"Q. You can guess then about where you took it up?

"A. About where." (Testimony of Capt. Paulsen, Ap. pp. 121, 122.)

"A. After it (the stern spring line) comes over or comes aboard the steam capstan, and it is held tight, and when that is held tight, we let go everything, stern lines and head lines all together, and go very slow on the engines, and that brings the stern in towards the dock, say, about this way, and at the same time we heave on our stern spring. That will bring the stern up this way—up this way. We let go all our lines except that spring, and when the ship was about this far, I blew the first time for the bridge.

"Q. How far out was that?

"A. About 20 degrees, something like that. The bridge didn't open that time. I didn't pay much attention to it. I thought it would open when it got ready; and we kept on going at the same or swinging turn, until the ship was 80 or 90 degrees, and blew the second time for the bridge, the ship still swinging with the current and the wind, and still heaving on this line. When she came down this way, so we couldn't use our line any more, and just about here would be a proper time to let go, about 120 degrees, 110 or 120 degrees, which would have been the proper time to let go." (Testimony of Capt. Paulsen, App. pp. 123, 124).

There is some conflict in the testimony as to the exact time when the master of the Yucatan cast off the stern spring line, but according to his own testimony he cast it off when the bow of the vessel was about 123 degrees off the dock (Ap. pp. 146, 147). By the time that he did cast off, the stern of the vessel had been drawn up the dock about 130 feet. (See testimony of Capt. Paulsen, Ap. pp 139, 140).

A very short time after this stern spring line was cast off, the Yucatan collided with the Boston. (See testimony of Captain Paulsen, Ap. p. 131). The first point of contact was on the starboard side of the Boston, at the forward gun sponson. (Ap. pp. 68 and 105). This sponson was about 75 feet north from the bow of the Boston (Ap. p. 48-49) and the Yucatan struck this sponson with her starboard after quarter. (See testimony of Gaven, Ap. pp. 67, 68). A few seconds thereafter, the starboard after quarter of the Yucatan collided with the six-inch gun on the starboard side of the Boston. (Testimony of Gaven, Ap. p. 68). This gun was situated approximately 85 feet from the bow of the Boston. (Ap. p. 176). At the time of the collision, the bow of the Yucatan (as appeared from models and testimony introduced at the trial) was toward the northwest and was more west than north. (Ap. pp. 70 and 131). It will thus be seen that the first point of collision was within 75 feet of the bow of the Boston, and that the second point of collision was about 85 feet from the bow of the

Boston. Therefore, since the distance from the north end of the Globe Milling Company's dock to the Broadway Bridge is 1300 feet (Ap. pp. 15 and 22), and the bow of the Boston was only 71 feet from the north end of this dock (Ap. p. 50), it is evident, in view of the position of the Yucatan at the time, that the Yucatan, at the time of the collision was more than 1000 feet away from the Broadway Bridge.

On May 25, 1914, the State of Oregon, lessee of the Boston, filed the within suit in admiralty against the Yucatan to recover for the damage which the Boston was alleged to have suffered by reason of this collision. Thereafter, the owner of the Yucatan filed a cross-bill against Multnomah County, alleging carelessness and negligence on the part of the operators of the Broadway Bridge. The cross-libelant claimed damages in the sum of $1200. Thereafter the suit was tried and a decree was entered in favor of the libelant, State of Oregon, and dismissing the cross-libel.

The following is a copy of the opinion which was rendered by the District Court:

"The case of the Oregon v. the Steamer Yucatan was a libel filed by the State against the steamship to recover damages caused by it to the cruiser Boston. It seems that the cruiser Boston was lying at her moorings in the Willamette River between the Broadway Bridge and the old Steel Bridge, and on the 3rd of March of this year the Yucatan, which had been taking cargo at the Globe Milling

Company's dock a short distance above the Boston, cast off her lines, intending to proceed down the river through the bridge, and in doing so came in collision with one of the guns of the Boston, injuring the gun gear and damaging the vessel to some considerable extent and destroying a piano in the vessel, and for this the State, as lessee of the Boston under a contract with the general government by which it shall have possession of the cruiser and under a guarantee to protect the Government against any damage or loss, brought this libel against the Yucatan to recover damages due to the collision. The Yucatan filed a cross libel in which she claims that the operators of the Broadway Bridge were so negligent and careless in opening the draw that the vessel was unable to leave the dock at the proper time and therefore caused the collision.

"Now, the facts are not particularly in dispute. The Yucatan just before she started on her voyage put out a stern spring line, cast off all her other lines and when she was, or her bow was, at an angle of about twenty degrees from the dock she blew a signal for the opening of the Broadway Bridge, but the captain claims that the bridge didn't open and he allowed his vessel to swing around until about at right angles to the dock, when he blew another signal for the opening of the bridge, and his contention is that the operator paid no attention to that signal. He still allowed his vessel to swing until it was 120 or 130 degrees to the dock, when he cast off his spring line and gave the signal to his engines for full speed astern, but at that time the vessel was in such a position that the current and the

wind caused her to drift down against the Boston and caused this damage.

"Now, it is in evidence that the captain was attempting to manage this boat himself, notwithstanding an ordinance of the City requiring vessels in the harbor to be navigated by a local pilot. He didn't take such local pilot and undertook to manage the vessel himself in the stream, and I have no doubt that the injury was due to the fact that he was not familiar with the currents and winds of the harbor, and that on account of his want of knowledge of these two points he didn't let off the spring line soon enough and therefore caused the injury. So I take it that under the facts in this case the damage was due to the negligence and carelessness of the Yucatan, and I do not find from the testimony that the action of the operators of the Broadway Bridge had any contributing effect to the damage. If the captain had let off his line before he allowed his vessel to swing so far around, he could probably have swung without touching the Boston.

"It is also claimed that the Boston was negligent in allowing her gun to project at right angles to the vessel, but the evidence shows that is really the only position in which the gun could be, and in my judgment it was not a contributing fact to the damage, so that a decree will be entered in favor of the libelant and against the Yucatan for the amount of damages claimed, except the item of expense for an investigation that was held by an order, as I understand, of the War Department, or in pursuance of some regulation of the War Department after the injury, which amounted to forty or fifty dollars. That item will be disallowed."

BRIEF OF THE ARGUMENT.

(Rule 24, Sub. 3.)

The Appellant's Assignments of Error, which are thirteen in number, are set forth on pages 36-39 inclusive of the printed apostles, and are as follows:

I.

Error of the Court in finding that there was negligence on the part of the master of the Yucatan in the matter of handling the Yucatan on leaving the Globe Dock.

II.

Error of the Court in finding that the absence of a harbor pilot was negligence on the part of the master of the Yucatan.

III.

Error of the Court in finding that the operators of the Broadway Bridge on the part of Multnomah County were not careless or negligent.

IV.

Error of the Court in failing to find that the action of the operators of the Broadway Bridge contributed to the accident.

V.

Error of the Court in not finding as to the position of the Boston in the fairway.

VI.

Error of the Court in not finding that the pro-

jection of the guns from the Boston were against the local ordinances and regulations of the harbor.

VII.

Error of the Court in not finding that it was error on the part of the Boston to lie in the fairway with the guns projecting the number of fee shown in the testimony.

VIII.

Error of the Court in not finding as to the harbor regulations of the City of Portland, and the United States regulations as to the opening of draws on bridges in the City of Portland.

IX.

Error of the Court in not finding the facts as to how the damage to the launch on the Boston was caused.

X.

Error of the Court in not finding as to the damage to the Yucatan.

XI.

Error of the Court in not finding as to whether or not the draw was up or had begun to be lifted when the Yucatan put on full speed.

XII.

Error of the Court in rendering and entering a decree in favor of the libelant and against the Yucatan and the claimant.

XIII.

Error of the Court in not rendering and entering a decree in favor of the claimant and against the libelant and the County of Multnomah for the amount claimed and proven by the claimant, or at least dividing the damages.

Of these assignments of error those numbered V, VI, VII and IX are of interest to the appellee, State of Oregon, but do not concern this appellee, Multnomah County.

As for Assignment of Error numbered II, we submit that the above quoted opinion of the trial court clearly shows that that Court did not find that the absence of a harbor pilot was negligence per se on the part of the master of the Yucatan. The Court did find, however, that as a matter of fact, there was no licensed pilot on board of the Yucatan, and that the captain attempted to manage the boat himself, all of which is admitted by the appellant to be true; and the Court further found that the captain was not familiar with the currents and winds of the harbor, and that on account of his want of knowledge of these two points, he did not let off the spring line soon enough, and therefore caused the injury, and that the damage was due to the negligence and carelessness of the Yucatan.

As for Assignment of Error No. VIII, there was no issue made by the pleadings in regard to the drawbridge regulations mentioned in that assignment.

In Assignment No. XI, the appellant charges that the Court erred in not finding as to whether or not the draw was up or had begun to be lifted when the Yucatan put on full steam. In this connection, however, we respectfully call the attention of the Court to the testimony of A. C. Paulsen, captain of the Yucatan (Ap. pp. 124, 129), where he expressly admitted that he did not give the signal for full speed ahead until after the bridge had commenced to open.

The only Assignments of Error, therefore, that remain for the consideration of the appellee, Multnomah County, are those numbered I, III, IV, X, XII and XIII. For the convenience of the Court we desire at this time to set out in their order these six assignments just mentioned. They are as follows:

I.

Error of the Court in finding that there was negligence on the part of the master of the Yucatan in the matter of handling the Yucatan on leaving the Globe Dock.

III.

Error of the Court in finding that the operators of the Broadway Bridge on the part of Multnomah County were not careless nor negligent.

IV.

Error of the Court in failing to find that the action of the operators of the Broadway Bridge contributed to the accident.

X.

Error of the Court in not finding as to the damage to the Yucatan.

XII.

Error of the Court in rendering and entering a decree in favor of the libelant and against the Yucatan and the claimant.

XIII.

Error of the Court in not rendering and entering a decree in favor of the claimant and against the libelant and the County of Multnomah for the amount claimed and proven by the claimant, or at least dividing the damages.

These six Assignments of Error, when summed up, amount merely to a contention by the appellant that the Court erred in finding that the master of the Yucatan was negligent and careless and caused the collision, and in not finding that the operators of the Broadway Bridge were negligent and careless and caused or contributed to the collision. The remainder of this brief will be devoted to answering this contention on the part of the appellant.

Throughout the course of this argument, this appellee will rely upon the following three propositions, namely:

1. That according to the draw-bridge regulations which the appellant pleaded and offered in evidence (Ap. pp. 14, 141), and which are set forth

in full on pages 226-230 inclusive of the Apostles, the Yucatan could not, at a distance of over 1000 feet from the Broadway Bridge, lawfully signal for the opening of the Broadway Bridge, until the vessel was actually **approaching** the bridge, and that at the time of the collision of the Yucatan with the Boston and during all the preceding time, the Yucatan was at a distance of more than 1000 feet from the Broadway Bridge, and that, in fact, and according to the appellant's own statement, the bridge was actually opening before the Yucatan began to **approach** the bridge.

2. That the Yucatan, at the time of each signal for the Broadway Bridge, and at the time of the collision, and during all the preceding time, was more than 1000 feet from the Broadway Bridge, and that under the draw-bridge regulations above mentioned, the operators of the bridge were not under any obligation to commence to open the bridge until the Yucatan was within 1000 feet of the bridge, but that, in fact, and according to the appellant's own statement, the bridge did commence to open before the Yucatan was within 1000 feet of the bridge, and that the bridge remained open from that time on until after the Yucatan had gone through the draw.

3. That the master of the Yucatan had no license as a pilot for the Portland harbor, and was violating the law by attempting to navigate the vessel himself without a licensed pilot on board, and

that when the Yucatan reached the point where she should have cast off her stern line, the bridge was already open, but that the master of the Yucatan was not familiar with the harbor and negligently failed to cast off at that point and by his own carelessness and unskillfulness brought about the collision.

We will now discuss the three points above mentioned in the order in which they are above set forth.

1. THAT ACCORDING TO THE DRAW-BRIDGE REGULATIONS WHICH THE APPELLANT PLEADED AND OFFERED IN EVIDENCE (Ap. pp. 14, 141), AND WHICH ARE SET FORTH IN FULL ON PAGES 226-230 INCL. OF THE APOSTLES, THE YUCATAN COULD NOT, AT, DISTANCE OF OVER 1000 FEET FROM THE BROADWAY BRIDGE, LAWFULLY SIGNAL FOR THE OPENING OF THE BROADWAY BRIDGE, UNTIL THE VESSEL WAS ACTUALLY **APPROACHING** THE BRIDGE, AND THAT AT THE TIME OF THE COLLISION OF THE YUCATAN WITH THE BOSTON AND DURING ALL THE PRECEDING TIME, THE YUCATAN WAS AT A DISTANCE OF MORE THAN 1000 FEET FROM THE BROADWAY BRIDGE, AND THAT, IN FACT, AND ACCORDING TO THE APPELLANT'S OWN STATEMENT, THE BRIDGE WAS ACTUALLY OPENING BEFORE THE YUCATAN BEGAN TO **APPROACH** THE BRIDGE.

The draw-bridge regulations in evidence in this case are set out in full in the printed Apostles, on

pages 226-230 incl. We call the attention of the Court to Sections 1, 2 and 6 of these regulations:

"Section 1. When, at any time during the day or night a vessel, unable to pass under the closed draw-span of any one of the above bridges, approaches it from a distance of over 1000 feet, the person in command of such vessel shall cause to be sounded, when said vessel shall be at a distance of not less than 1000 feet, the prescribed signal, and shall repeat this signal until it is understood at the bridge. (Ap. p. 227).

"Section 2. When such vessel is about to leave a landing 1000 feet or less from the draw-bridge, with the intention of passing through the draw, the person in command shall cause the prescribed signal to be sounded at such interval before leaving the landing that the draw may be opened in time for the vessel to pass. (Ap. pp. 227, 228.)

"Section 6. Upon hearing the signals hereinbefore prescribed, the engineer or operator of a draw-bridge shall promptly open the draw, except between the hours of 6:30 A. M. and 7 A. M., 7:15 A. M. and 7:45 A. M., 8:05 A. M. and 8:30 A. M., 5:15 P. M. and 5:45 P. M., and 6 P. M. and 6:30 P. M.; provided, that the draw shall be promptly opened for the passage of sea-going vessels of 250 tons or over upon the prescribed signal at any hour of the day or night; and provided further that when any vessel shall arrive at any bridge within five minutes before 6:30 A. M., 7:15 A. M., 8:05 A. M., 5:15 P. M., or 6 P. M., it shall be passed promptly through all the bridges in the direction in which it is moving and shall not be stopped between bridges." (Ap. pp. 229, 230).

It is plain that section 2 of the above regulations applies only to such vessels as are about to leave a landing 1000 feet **or less** from the draw-bridge. In the case at bar, the record shows that the Yucatan was leaving a landing **more** than 1000 feet, to-wit: 1300 feet south from the Broadway Bridge. (App. pp. 15 and 22). Moreover, while the Yucatan was lying at this dock, her stern was 40 feet south from the north end of the dock. (Ap. p. 173). Consequently, the Yucatan was lying at a landing 1340 feet from the Broadway Bridge. It is clear, therefore, that section 2 of the regulations does not apply in this case.

Section 1 of the regulations applies only to such vessels as are **approaching** a draw-bridge from a distance of over 1000 feet. In this connection, we respectfully call the attention of the Court to the manner in which the Yucatan left the dock, as shown by the testimony. A few minutes before the vessel was ready to leave, as above stated in this brief, the captain put out a stern spring line from the offshore quarter on the starboard side of the vessel, and ran this line around the stern and up the dock to a cleat on the dock about 150 feet south from the stern of the vessel, or about amidships. Then he cast off all the lines except this stern spring line, and started the engines slowly, and kept this stern spring line tight, and this started the bow of the vessel swinging away from the dock. All the while that the vessel was swinging, the stern spring line was kept tight, and this

drew the stern of the vessel up the dock. (Testimony of Capt. Paulsen, Ap. pp. 121, 122, 123, 124). The vessel kept swinging in this manner, fastened all the while to the dock by this stern spring line, until the bow of the vessel was about 120 degrees off the dock. (Testimony of Capt. Paulsen, Ap. pp. 124 and 131). And when Captain Paulsen, the master of the Yucatan, finally did cast off this stern line, the bridge was already open. Note the following testimony:

"Q. I understand you to say, when you cast off, the draw was opening?

"A. Yes.

"Q. And that you cast off when you were about 123 degrees?

"A. 120 or 123 degrees. Between 120 and 130 degrees. (Testimony of Capt. Paulsen, Ap. pp. 136, 137).

"Q. And you cast off at the time you sounded the danger signal?

"A. No, I cast off as the bridge commenced to open." (Testimony of Capt. Paulsen, Ap. p. 208).

We submit that a vessel swinging around as this vessel was swinging, fastened to the dock by a stern line, cannot be said to have been **approaching** the bridge. Instead of getting nearer to the bridge while making this turn, she was in reality getting farther away from the bridge, for by the time that this stern spring line was finally cast off, the stern of the vessel had been drawn up the dock 130 feet.

We quote the following testimony by Captain Paulsen:

"Q. How far from that 150 foot point was the extreme stern of the Yucatan when you let go? Was it pretty near to that cleat?

"A. As far as I recall, it must have been—well, we used to let off up about 20 feet from the cleat, north of the cleat." (Testimony of Capt. Paulsen, Ap. p. 139).

"Q. Well, the Yucatan was 337 feet long, and if she was 130 feet up the dock, the last 130 feet of the Yucatan would touch the dock, wouldn't it, if you hung on? It would have touched the dock, wouldn't it?

"A. Yes." (Testimony of Capt. Paulsen, Ap. p 140).

Moreover, Captain Paulsen admits in the following testimony that he did not **start** for the bridge or get under way for the bridge until after the bridge commenced to open:

"A. . . . and a very short time after I blew the danger signal the bridge commenced to open, and I gave a bell for full ahead, full speed ahead." (Testimony of Capt. Paulsen, Ap. p. 124).

"A. I still hung on to the stern line until I saw the bridge commence to open, and I could see I had a chance to go full ahead with the ship, and get away from the Boston on a port helm, as I explained.

"Q. So you then started for the opening?

"A. For the draw, yes." (Testimony of Capt. Paulsen, Ap. p. 129).

A plain construction of section 1 of the foregoing regulations, considered in connection with Section 6, above quoted, would seem to be that a vessel which is at a distance of over 1000 feet from a draw-bridge cannot lawfully signal for the opening of the bridge until she is actually **approaching** the bridge. We submit that up to the time when the Yucatan, in the case at bar, actually cast off her stern line, she was not an **approaching** vessel and had no right, under the regulations, to signal for the bridge. She was merely engaged in getting away from her landing and in **preparing** to **approach** the bridge. Yet, when she did cast off her stern line, the bridge, according to the captain's own testimony, was already opening. We therefore respectfully contend that the operators of the Broadway Bridge more than satisfied the requirements of the regulations.

2. THAT THE YUCATAN, AT THE TIME OF EACH SIGNAL FOR THE BROADWAY BRIDGE, AND AT THE TIME OF THE COLLISION, AND DURING ALL THE PRECEDING TIME, WAS MORE THAN 1000 FEET FROM THE BROADWAY BRIDGE, AND THAT UNDER THE DRAW-BRIDGE REGULATIONS ABOVE MENTIONED, THE OPERATORS OF THE BRIDGE WERE NOT UNDER ANY OBLIGATION TO COMMENCE TO OPEN THE BRIDGE UNTIL THE YUCATAN WAS WITH-

IN 1000 FEET OF THE BRIDGE, BUT THAT, IN FACT, AND ACCORDING TO THE APPELLANT'S OWN STATEMENT, THE BRIDGE DID COMMENCE TO OPEN BEFORE THE YUCATAN WAS WITHIN 1000 FEET OF THE BRIDGE, AND THAT THE BRIDGE REMAINED OPEN FROM THAT TIME ON UNTIL AFTER THE YUCATAN HAD GONE THROUGH THE DRAW.

The draw-bridge regulations above referred to provide in effect, that when at anytime during the day or night a vessel, unable to pass under the closed draw-span of any one of the bridges, approaches it from a distance of over 1000 feet, the person in command of such vessel shall cause to be sounded, when said vessel shall be at a distance of not less than 1000 feet, the prescribed signal, and shall repeat this signal until it is understood at the bridge, and that upon hearing such signal, the engineer or operator of the draw-bridge shall promptly open the draw. These regulations declare that the signal must be sounded when the vessel is at a distance of not less than 1000 feet from the draw. The regulations do not provide, however, what shall be the greatest distance from which a signal, when sounded, shall be a lawful signal which the operators of the bridge must promptly obey. It is the apparent meaning of these regulations that if the prescribed signal is given when the vessel is at a distance of not less than 1000 feet from the bridge, the operators of the bridge will thereupon

be charged with the duty of getting the bridge open in time to allow the vessel to pass through undelayed.

In the case at bar, the record shows that when the bow of the Yucatan started to swing away from the landing, her stern was 1340 feet from the bridge. (Ap. pp. 15 and 22 and 173). The captain of the Yucatan, himself, admits that by the time the bow of the vessel was about 120 degrees off the dock, the bridge was opening (Ap. pp. 146, 147 and 208, Testimony of Capt. Paulsen). By that time, the stern of the vessel had been drawn 130 feet up the dock and was therefore 1472 feet away from the bridge. (Ap. pp. 139, 140). From the time that the bridge commenced to open it took only about one minute to open it completely (Ap. pp. 146-180), and it remained open from that time on (Ap. p. 183). Consequently, it is obvious even from the testimony of the appellant's own witnesses, that the bridge opened while the vessel was considerably more than 1000 feet away. Therefore, even assuming for the purposes of the argument, that the Yucatan, while swinging away from the dock by her stern line, would be regarded as **approaching** the bridge, we still claim that the operators of the bridge more than complied with the regulations.

3. THAT THE MASTER OF THE YUCATAN HAD NO LICENSE AS A PILOT FOR THE PORTLAND HARBOR, AND WAS VIOLATING THE LAW BY ATTEMPTING TO NAVIGATE THE VESSEL HIMSELF WITHOUT A LICENSED PILOT ON BOARD, AND THAT

WHEN THE YUCATAN REACHED THE POINT WHERE SHE SHOULD HAVE CAST OFF HER STERN LINE, THE BRIDGE WAS ALREADY OPEN, BUT THAT THE MASTER OF THE YUCATAN WAS NOT FAMILIAR WITH THE HARBOR AND NEGLIGENTLY FAILED TO CAST OFF AT THAT POINT AND BY HIS OWN CARELESSNESS AND UNSKILLFULNESS BROUGHT ABOUT THE COLLISION.

Section 4401 Rev. Stat. U. S., is as follows:

"All coastwise sea-going vessels, and vessels navigating the great lakes, shall be subject to the navigation laws of the United States, when navigating within the jurisdiction thereof; and all vessels, propelled in whole or in part by steam, and navigating as aforesaid, shall be subject to all the rules and regulations established in pursuance of law for the government of steam-vessels in passing, as provided by this Title; and every coastwise sea-going steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall when underway, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats."

Section 4438 Rev. Stat. U. S., is as follows:

"The boards of local inspectors shall license and classify the masters, chief mates and second and third mates, if in charge of a watch, engineers and pilots of all steam vessels, and the masters of sail vessels of over seven hundred gross tons, and all other vessels of over one hundred gross tons carrying passengers for hire. It shall be unlawful to

employ any person or for any person to serve as a master, chief mate, engineer, or pilot of any steamer or as master of any sail vessel of over seven hundred gross tons or of any other vessel of over one hundred gross tons carrying passengers for hire who is not licensed by the inspectors; and anyone violating this section shall be liable to a penalty of one hundred dollars for each offense."

The Yucatan is a coastwise sea-going steam vessel of a gross tonnage of 3500 tons (Testimony of Captain Paulsen, Ap. p. 120). It is admitted in the pleadings and shown by the evidence that on the day of the collision, the master of the Yucatan did not have a license as a pilot for the Portland harbor, and that there was no licensed pilot on board the vessel, and that at the time of the collision the master of the Yucatan was attempting to navigate the vessel himself in violation of both of the above quoted statutes. (Ap. pp. 6, 10, 119, 120.) It follows, therefore, that since the Yucatan was violating a statutory rule, the burden is upon her of showing that her fault could not have been a contributing cause of the collision.

The Beaver, 219 Fed. 134, 138.
7 Cyc. 370.
The Santa Clara, 21 Fed. Cas. No. 12, 327.
The Pennsylvania, 19 Wall. (U. S.) 125, 136.
The City of Washington, 92 U. S. 31.
The Admiral Schley, 142 Fed. 64.
The Ellis, 152 Fed. 981.

In the language of the Circuit Court of Appeals for the Ninth Circuit, in the case of "The Beaver," 219 Fed. 134, 138:

"Where a vessel has committed a positive breach of a statutory duty, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so."

> The Beaver, 219 Fed. 138 (Adv. Sheets) (Decided Jan. 4, 1915).

We claim that in the case at bar, the evidence fully justifies the findings of the trial court to the effect that the collision was brought about entirely by Captain Paulsen's want of familiarity with the Portland harbor, and by the careless and negligent manner in which he handled the Yucatan and by his failure to cast off the stern line at the proper time.

The appellant contends, however, that when the Yucatan reached the point where she should have let go of her stern line, the bridge had not yet begun to open. This is the only ground on which the owner of the Yucatan attempts to hold Multnomah County liable. The contention which is thus made by the appellant is not in any manner supported by the evidence. In this connection, we respectfully call the attention of the Court to the following testimony on the question as to what would have been the proper time for the Yucatan to cast off:

On page 204 of the Apostles, we find the following testimony by Captain W. W. Pope:

"Q. Now, based on your experience as a pilot, in turning around the Yucatan at that place, under those circumstances, and in that manner, to go through the Broadway Bridge, at what time should the pilot cast loose from the stern line and head out for the draw?

"A. Well, I should say from 100 to 120 degrees. . . .

"Q. If the bridge was opening, when he reached 120 degrees, he should have let go?

"A. Sure."

And on page 124 of the Apostles, we find the following testimony, as given by A. C. Paulsen, captain of the Yucatan:

"When she came down this way, so we couldn't use our line any more, and just about here would be a proper time to let go, about 120 degrees, 110 or 120 degrees, which would have been the proper time to let go."

It thus appears that Captain Paulsen, of the Yucatan, agrees with Captain Pope that a point of from 100 to 120 degrees off the dock would have been the proper place for the Yucatan to let go her stern line, but, in the very next breath, Captain Paulsen adds that when the Yucatan reached a point of 120 degrees the bridge had not yet commenced to open. (See Ap. p. 124). At this time, therefore, we desire to call the attention of the

Court to the following testimony in the record, as to the position of the Yucatan when the bridge did commence to open.

TESTIMONY OF ROBERT B. SMITH, FOREMAN OF THE BROADWAY BRIDGE.

"Q. Which way was the Yucatan pointed when he gave his first signal?

"A. If the river was north and south, she pointed south." (Ap. p. 181).

"Q. Now what position was the Yucatan in when you opened the draw?

"A. Well, sir, as near as I could see, I would say due west; maybe a trifle to the south, may have been a trifle to the north, but I am positive that she was looking to the west.

"Q. And did the bridge remain open from that time on until she got through?

"A. It did, sir." (App. pp. 182, 183).

"Q. Just one question I want to clear up. You are clear in your own mind as to the direction in which the boat was pointing when the draw did open?

"A. I am clear, sir.

"Q. What direction was it?

"A. When the draw was open?

"Q. Yes.

"A. Due west, sir." (Ap. p. 189).

It thus appears from the testimony of Mr. Smith, foreman of the bridge, that the bridge was open

when the Yucatan reached a point 90 degrees off the dock, and that the bridge remained open from that time on until after the Yucatan had gone through the bridge.

But particularly interesting is the testimony of the master of the Yucatan, Captain Paulsen, himself, as to what was the position of the Yucatan when the bridge opened. We respectfully call the attention of the Court to the following excerpts from Captain Paulsen's testimony:

TESTIMONY OF CAPTAIN A. C. PAULSEN,
Master of the Yucatan.

"A. When she came down this way, so we couldn't use our line any more, and just about here would be a proper time to let go, about 120 degrees, 110 or 120 degrees, which would have been the proper time to let go, but the bridge wasn't open, when I blew the danger signal, and a very short time after I blew the danger signal, the bridge commenced to open." (Testimony of Captain Paulsen, Ap. p. 124).

"A. I still hung on to the stern line until I saw the bridge commence to open." (Testimony of Captain Paulsen, Ap. p. 129).

"Q. At what angle were you when you cast off your spring line, Captain Paulsen, as near as you recollect?

"A. About 120 degrees—90 degrees would be pointing right across the river.

"Q. Would be right angles?

"A. And just about 30 degrees more." (Testimony of Captain Paulsen, Ap. p. 131).

(N. B.—Captain Paulsen in his testimony used the term "stern line" and "spring line" interchangeably.)

"Q. I understand you to say, when you cast off, the draw was opening?

"A. Yes.

"Q. And that you cast off when you were about 123 degrees?

"A. 120 or 123 degrees. Between 120 and 130 degrees." (Testimony of Captain Paulsen, Ap. pp. 146, 147).

"Q. And you cast off at the time you sounded the danger signal?

"A. No, I cast off as the bridge commenced to open." (Testimony of Captain Paulsen, Ap. p. 208).

We submit that if the above testimony by Captain Paulsen means anything at all, it clearly means that the proper time, in his judgment, to cast off was when the Yucatan was at a point of about 120 degrees, and that he did cast off when the Yucatan was at a point of about 120 degrees, and that when the Yucatan was at this point of about 120 degrees, where he should have cast off and did cast off, the bridge was already open. In other words, according to Captain Paulsen's own testimony, the bridge opened as soon as it should have opened. If all of these statements by Captain Paulsen are true, it is

difficult to see what fault the owner of the Yucatan can possibly find with the operators of the bridge.

Moreover, the cross-libel of the appellant alleges that the Yucatan did not cast off until after the bridge commenced to open (Ap. pp. 14, 15), and this allegation, taken in connection with Captain Paulsen's testimony as above given, to the effect that he cast off at 120 degrees, and that 120 degrees was the proper place to cast off, is conclusive as an admission on the part of the appellant that the bridge opened soon enough. As stated in Vol. I, Corpus Juris, p. 1335:

"In admiralty, a party's averments are admissions by him and need no proof, unless denied and put in issue, and neither party can contradict by proof the averments set forth in his pleading."

See also:

1 Cyc. 886.

Totten v. The Pluto, 24 Fed. Cas. No. 14, 106.

In view of the testimony and pleadings above quoted and referred to, we confidently assert that the record in this case clearly shows that the owner of the Yucatan has no just reason to complain of the Broadway Bridge. The captain of the Yucatan says he cast off at about 120 degrees. He also says that that was the proper time to cast off. It is admitted by the pleadings and shown by the appellant's own evidence that the bridge was open at that time and remained open from that time on. Captain Pope, the pilot called by the County, says that

the proper place for the Yucatan to cast off was at a point of from 100 to 120 degrees (Ap. p. 204), and Robert B. Smith, the foreman of the bridge, testifies that the bridge was open at the time when the Yucatan reached a point of only 90 degrees, and that the bridge remained open from that time until after the Yucatan had passed through the bridge. (Ap. pp. 182, 183, 189). It is admitted by all concerned that the collision did not happen until after the Yucatan had cast off. It is clear, therefore, under any view of the circumstances, that the operators of the bridge could not have been in any manner to blame for this collision.

At the time of the collision, the captain of the Yucatan was violating the statute by not having a licensed pilot on board. The burden is therefore upon him of showing that his own negligence could not have caused the accident. (The Beaver, 219 Fed. 138). We submit that he has failed to show this. The testimony, instead, clearly proves, as found by the District Court, that the Captain of the Yucatan was not familiar with the currents and winds of the harbor, and that his own negligence and carelessness were the sole cause of the collision.

Counsel for the appellant, however, lays much stress on the fact that the bridge did not open until fourteen minutes after the first signal was given. It is also claimed by appellant that this first signal was given when the Yucatan was about 20 degrees off the dock. In this connection, however, we desire to point out that, according to the testimony,

the vessel had not yet begun to swing away from the dock when the first signal was given, and that it took Captain Paulsen considerably more than fifteen minutes thereafter to turn the vessel around. We call the Court's attention to the following testimony:

"Q. Now, Captain, state what line it was that was used by you on the third of March at this time, what line was cast off, and lines were used?

"A. Why, getting under way, you mean?

"Q. Yes, when you left the Globe Dock.

"A. Well, about five minutes before we got ready to leave the dock we run out what we call a stern spring." (Testimony of Captain Paulsen, Ap. p. 121).

"Q. How soon did you cast off before you actually started to turn?

"A. I blew the whistle first for the bridge, then we let go our lines and the ship started in to swing." (Testimony of Captain Paulsen, Ap. p. 132).

"Q. I would like to get this into the record, the questions and answers: 'Q. Just what time did your clock say that you blew for the Broadway Bridge? A. Twelve o'clock we let go of the head lines, in order to swing the ship around, hanging on to our stern line. Q. Then what happened? A. The ship being about 20 degrees off the dock, I blew the second whistle for the bridge to open, but no attention was paid from the bridge.' Now did you give that testimony?

"A. I did." (Testimony of Captain Paulsen, Ap. p. 134).

We think the above testimony by Captain Paulsen plainly indicates that the Yucatan blew the first signal for the bridge before the bow of the vessel had started to swing away from the dock.

But even granting, for the sake of argument, that the first whistle for the bridge was blown when the Yucatan was 20 degrees off the dock, and that the bridge did not open until fourteen minutes thereafter, yet, even under that view of the matter, considered in connection with Captain Paulsen's statement, as above pointed out, to the effect that when the Yucatan reached a point of 120 degrees off the dock the bridge was opening, the obvious conclusion must be that it took the Yucatan fourteen minutes to swing from a point 20 degrees off the dock, to a point 120 degrees off the dock. Note again the following testimony by Captain Paulsen:

"A. We let all our lines go except that spring, and when the bridge was about this far, I blew the first time for the bridge.

"Q. How far was that?

"A. About 20 degrees, something like that. The bridge didn't open that time. I didn't pay much attention to it. I thought it would open when it got ready; and we kept on going at the same or swinging turn, until the ship was about 80 or 90 degrees, and I blew the second time for the bridge, the ship

still swinging with the current and the wind, and still heaving on this line. When she came down this way, so we couldn't use our line any more, and just about here would be a proper time to let go, about 120 degrees, 110 or 120 degrees." (Testimony of Captain Paulsen, Ap. pp. 123, 124).

"Q. At what angle were you when you cast off your spring line, Captain Paulsen, as near as you recollect?

"A. About 120 degrees—90 degrees would be pointing right across the river." (Testimony of Captain Paulsen, Ap. p. 131).

"Q. And you cast off at the time you sounded the danger signal?

"A. No, I cast off as the bridge commenced to open." (Testimony of Captain Paulsen, Ap. p. 208).

The above testimony clearly shows that during the time that the vessel was swinging from the point of 20 degrees to the point of 120 degrees, there was no delay or trouble, but that the vessel was swinging all the while in the manner that her captain wanted her to swing and at the rate of speed that he approved of; and if we are to consider as true the above quoted portion of the captain's testimony, and are also to concede that from the time when the Yucatan reached a point 20 degrees off the dock, it was fourteen minutes until the bridge began to open, we must necessarily believe that it took the Yucatan fourteen minutes to swing from a point of

20 degrees to a point of 120 degrees, at which point last mentioned the bridge, according to Captain Paulsen's own testimony, did begin to open.

Counsel for the appellant evidently proceed on the theory that the Broadway Bridge ought to have been open during the whole of this space of fourteen minutes while the Yucatan was engaged in making this leisurely turn. There might be some reason in this theory, were it not for the fact that the Broadway Bridge is a city thoroughfare as well as an alleged obstruction to navigation, and that, as shown by the pleadings, and indeed as a matter of common knowledge, this bridge is constantly traversed at all hours of the day by street cars, pedestrians and vehicles in large numbers. As was said by the Court in the case of Gilman v. Philadelphia, 70 U. S. (3 Wall.) 713, 729:

"It must not be forgotten that bridges, which are connecting parts of turnpikes, streets and railroads, are means of commercial transportation, as well as navigable water, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs."

(See 4 A. & E. Encyc. of Law (2d Ed.), 924.)

And in the case of Scott v. Chicago, Fed. Cas. 12526 (1 Biss, 510) (21 Fed. Cas. 814, 815), the Court said:

"The right of navigation does not take away the right of crossing the river . . . The two rights coexist and each one must be construed with refer-

ence to the other, precisely as we qualify the right to travel along a street by the right to cross it. The navigator must yield something to the foot-passenger, just as the latter must yield something to the navigator."

And in the language of the Court in the case of Columbus Ins. Co. v. Peoria Bridge Association, Fed. Cas. No. 3046) (6 McLean 70), 6 Fed. Cas. 191, 192:

"It must be considered as settled that the right to a free navigation of our Western rivers, and the right of the State to adopt those means of crossing them which the skill and ingenuity of man have devised, as both are equally important, are co-existant, and neither can be permitted to destroy or essentially impair the other."

In the case of United States v. T. J. Cleeton, County Commissioners, et al., tried in the United States District Court for the District of Oregon, April 24, 1911 (not reported), Judge Bean gave the following instructions to the jury:

"It is the duty of persons operating a drawbridge, under the statute to which I have alluded (Act of August 18th, 1894, 28 St. L. 362) to open or cause it to be opened without unreasonable delay after the proper signals have been given, and what constitutes unreasonable delay is to be determined with reference to the state of the traffic at the time, the construction of the draw and the conditions existing at the time the signal is given by the boat."

We also quote as follows from the case of Escanaba Co. v. Chicago, 107 U. S. 678, 682:

"Ten minutes is ample time for any vessel to pass the draw of a bridge, and the allowance of more time would subject foot passengers, teams and other vehicles to great inconvenience and delays. . . . . The rights of each class are to be enjoyed without invasion of the equal rights of others. Some concession must be made on every side for the convenience and the harmonious pursuit of different occupations."

In the case at bar, the evidence conclusively shows that the bridge was open before the Yucatan reached the point where she should have cast off her stern line. The evidence also shows that from that time on, the bridge remained open until after the Yucatan had passed through the draw. The bridge was therefore open soon enough and long enough.

For the purpose of sustaining its contention that the appellee, Multnomah County, is liable in this suit, the appellant has cited the following cases:

Greenwood v. Westport, 60 Fed. 560; 53 Fed. 824.
Etheridge v. Philadelphia, 26 Fed. 43.
City of Boston v. Crowley, 38 Fed. 202.

We do not deem it necessary to enter into an extended discussion of any of these cases, for, in our judgment, none of them is in point in this case. In the case of Greenwood v. Westport, the facts were

that the town of Westport maintained and operated a draw-bridge across a stream which was navigable only at high tide. The libelant's barge approached the bridge about high-water and signaled for the opening of the draw. The draw-tender was absent, and one of the selectmen of the town undertook to open the draw; failing in his attempt, he discovered that it was locked underneath and he then procured a boat and opened the draw. In the meantime the barge had been delayed about half an hour, the tide had fallen some six inches, and, while passing through the draw, the barge struck on the bottom and sank, suffering serious injury. It was held that there was negligence on the part of the town. In the case of Etheridge v. City of Philadelphia, the facts were that a schooner was passing through the draw-bridge in question in the case. Those in charge of the bridge, owing to its being out of order were unable to fasten the draw securely. It got beyond their control, swung around, struck and damaged the schooner. And it was held that the municipal corporation owning the bridge was responsible for the negligence. The case of City of Boston v. Crowley was a case in which the city owning a bridge was held liable for damages for having failed to maintain a draw of the width which the law required. The three cases just discussed are the only cases cited by the appellant in support of its claim against Multnomah County in the case at bar. No facts, however, such as were involved in any of those cases are found in this case. In this

case, the collision in question happened over 1000 feet away from the bridge. The bridge was open at the time of the collision and before the collision. Indeed, as above pointed out in this brief, the bridge was open before the Yucatan began to **approach** the bridge. Moreover, it clearly appears from the evidence that the bridge opened before the vessel reached the point where she should have cast off her stern line. And, finally, it is virtually admitted by the captain of the Yucatan, himself, that the bridge opened as soon as it should have opened.

We submit that in this case only one conclusion can be reached, and that conclusion must be that the collision was caused entirely by the negligence and unskillfulness of the captain of the Yucatan. This was not the first time that this captain had shown himself to be an imprudent navigator. Only a few months before, according to his own testimony, he had recklessly run a vessel aground at San Diego. (Ap. pp. 137, 138.) At the time of the collision in the case at bar, he was not familiar with the Portland harbor and had no license as a pilot for the harbor, and he was violating the law by failing to have a licensed pilot on board. Attempting to navigate the vessel himself, he failed to cast off the stern line at the proper time, and by his own negligence and lack of skill he brought misfortune to his own vessel and to the Boston.

The owner of the Yucatan must therefore stand the loss. As was said by the Court in the case of Jolly et al v. Terre Haute Drawbridge Company,

Fed. Cas. No. 7441 (6 McLean, 237), 13 Fed. Cas. 919, 922:

"It will therefore be a proper inquiry for the jury, whether the plaintiffs' boat, in passing the bridge, was managed with ordinary skill and caution. For, conceding the bridge to be an unlawful obstruction, yet if the plaintiffs' injury is clearly referable to the reckless and unskillful management of the plaintiffs' boat, the draw-bridge company are not responsible for such injury."

And in the same case (Jolly et al v. Terre Haute Drawbridge Company, Fed. Cas. No. 7441, 13 Fed. Case. 919, 922), the Court used the following language:

"It is proper here to remark, in reference to the pilot of the plaintiffs' boat, that the evidence is satisfactory as to his professional character. He had served in that capacity for some years, on the Wabash, and it is in proof that he is esteemed a safe, prudent and skillful pilot. But notwithstanding this evidence of general good professional reputation, if in this particular case he evinced recklessness and want of skill, and the injury to the plaintiffs' boat is attributable to that cause, they must bear the consequences of his misconduct."

In the present case, of course, as in all cases, there is some conflict in the testimony. The district judge who tried the case, however, had the opportunity of seeing the different witnesses and hearing their testimony, and we feel confident that his decision will not be set aside. In the language of the Circuit Court of Appeals for this circuit, in

the case of The Alijandro, 56 Fed. 621, as quoted and followed in the case of "The Samson" (Ninth Circuit, decided October 13, 1914), 217 Fed. 344, 347:

"The rule is well settled that in cases on appeal in admiralty, when the questions of fact are dependent upon conflicting evidence, the decision of the district judge, who had the opportunity of seeing the witnesses and judging their appearance, manner and credibility, will not be reversed, unless it clearly appears that the decision is against the evidence."

The Samson, 217 Fed. 344, 347.
Reed v. Weule, 176 Fed. 660.
Peterson v. Larsen, 177 Fed. 617.
The Bailey Gatzert, 179 Fed. 44.

We respectfully urge that the decree of the District Court should be affirmed.

Respectfully submitted,

WALTER H. EVANS,
District Attorney,
GEORGE MOWRY,
Deputy District Attorney,
Proctors for Multnomah County.

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2579

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CITY OF ASTORIA, a municipal corporation of the State of Oregon,
Plaintiff in Error.

vs.

AMERICAN LA FRANCE FIRE ENGINE COMPANY, a corporation,
Defendant in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error to the District Court of the United States for the District of Oregon

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CITY OF ASTORIA, a municipal corporation of the State of Oregon,
Plaintiff in Error.

vs.

AMERICAN LA FRANCE FIRE ENGINE COMPANY, a corporation,
Defendant in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error to the District Court of the United States for the District of Oregon

INDEX

In the District Court of the United States

FOR THE

DISTRICT OF OREGON

SUIT AT LAW NO. 6406

AMERICAN LA FRANCE FIRE ENGINE COMPANY, a corporation,

Plaintiff.

VS.

THE CITY OF ASTORIA, a municipal corporation of the State of Oregon,

Defendant.

CITATION

To the American-LaFrance Fire Engine Company, a corporation, greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals, for the 9th Circuit, at San Francisco, California, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein the City of Astoria, a municipal corporation of the State of Oregon, said defendant, is plaintiff in error and you are defendant in error, to show cause, if any

there be, why the judgment in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland, Multnomah County, Oregon, in said District, this 3rd day of February, 1915.

Chas. E. Wolverton, Judge.

Due service of the within citation on writ of error is hereby admitted, this 3rd day of February, 1915, by receiving a duly certified copy of said citation on writ of error, certified to be a copy thereof by A. W. Norblad, attorney for said defendant.

Fulton & Bowerman,
Attorneys for Plaintiff.

Filed February 3, 1915,
G. H. Marsh, Clerk.

In the District Court of the United States for the District of Oregon, March Term, 1914.

Be it Remembered, That on the 16th day of May, 1914, there was duly filed in the District Court of the United States for the District of Oregon, a Complaint, in words and figures as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

AMERICAN-LaFRANCE FIRE ENGINE COMPANY, Inc., a corporation,

Plaintiff,

vs.

THE CITY OF ASTORIA, a municipal corporation of the State of Oregon,

Defendant.

The above named plaintiff, complaining of the above named defendant, for its cause of action alleges:

I.

That the plaintiff is, and during all the time hereinafter mentioned was, a corporation duly created, incorporated, organized and existing under and pursuant to the laws of the State of New York, and as such corporation engaged in the business of manufacturing and selling fire engines and apparatus employed in extinguishing fires. That plaintiff has complied with all of the laws of the State of Oregon regulating foreign corporations and prescribing what they shall do in order to be permitted to carry on, conduct and transact business in the State of Oregon, including the payment of all taxes required of such corporations and including the payment of the annual tax on such corporation for the years 1913 and 1914.

II.

That the defendant, City of Astoria, is a municipal corporation of the State of Oregon, duly incorporated, organized and existing under and pursuant to an act of the Legislative Assembly of the State of Oregon entitled "An Act to incorporate the City of Astoria, in Clatsop County, Oregon," approved October 20th, 1876, and acts amendatory thereof.

III.

That the powers and authority of the defendant, vested in it by its charter, are vested in and exercised by a mayor and a common council of said City of Astoria, and during all the time hereinafter mentioned the Common Council of said City of Astoria consisted of nine Councilmen.

IV.

That among other committees duly created and constituted by said Common Council and existing during all the time herein mentioned was the Committee on Fire and Water of said Common Council, composed of three members thereof, which three members of said committee were Charles Wilson, John Nordstrom and Karl Knobloch.

V.

That on the —— day of June, 1897, said Common Council of the said defendant duly enacted an

ordinance entitled "An ordinance to establish a paid fire department, etc.," and which ordinance was, after its passage, duly approved by the Mayor of said defendant on the 15th day of June, 1897. That said ordinance created and organized a paid fire department of the said City of Astoria, and Section 1 of said ordinance is in words and figures as follows:

> "Section 1. That there be and hereby is, organized a paid fire department of the City of Astoria, with powers and duties to be exercised by and through the Committee on Fire and Water of the Common Council of said City."

That Section 3 of said ordinance is in words and figures as follows, to-wit:

> "Section 3. The Committee on Fire and Water, and their successors in office, shall constitute and be ex-officio fire commissioners of the fire department of the City of Astoria."

That among other duties imposed on said committee as such commissioners by such ordinance was the duty of appointing from time to time a chief engineer of said fire department, and prescribing his duties, and it was also made the duty of said committee to organize the engine companies, hose companies, hook and ladder companies, and chemical engine companies, so as to meet the requirements of the said City of Astoria. That Sec-

tion 11 of said ordinance is in words and figures as follows, to-wit:

> Section 11. The Committee on Fire and Water, the ex-officio fire commissioners, shall purchase all supplies for the fire department and order all necessary repairs, subject to the ordinances of the City of Astoria."

Section 15 of said ordinance is in words and figures as follows, to-wit:

> "Section 15. The Committee on Fire and Water, the ex-officio fire commissioners, shall report to the Common Council at least once in each month the expenditures of the department, with other matters pertaining thereto of public interest, and shall in the month of January of each year, report in detail to the Common Council the annual receipts and expenditures of the department, including a complete inventory of all the property in their charge."

VI.

That on the 21st day of July, 1913, the said Committee on Fire and Water presented to the Mayor and Common Council of said defendant city a communication in words and figures as follows:

> "Astoria, Oregon, July 21st, 1913.
>
> "To the Mayor and Council.
>
> "Gentlemen:
>
> "In connection with the recommendation of the Chief of the Fire Department we would recommend that we be authorized to get prices

on another auto fire apparatus and submit them with our recommendations to the next meeting of the Council.

"Charles Wilson,
"Karl Knobloch,
"John Nordstrom,
"Committee on Fire and Water."

That the said Common Council of the said defendant city met in regular session on said 21st day of July, 1913, and the said communication from the said Committee on Fire and Water was received by said Common Council, and after the same had been read a motion was duly made and seconded and carried by the unanimous vote of said Council that said Committee be authorized to secure prices and report the same to the Council as in its said communication recommended. That thereafter on the 4th day of August, 1913, the said Common Council duly met in regular session, and at such meeting the said Committee on Fire and Water duly submitted to the said Common Council a report in words and figures as follows, to-wit:

"Astoria, Oregon, August 4th, 1913.

"To the Mayor and Council.

"Gentlemen:

"In accordance with action of last meeting we herewith submit the cost of a piece of auto apparatus.

"A combination wagon, single tank, will cost $5500; with double tanks $5800. A triple combination pump-hose and chemical, the size we think proper, will cost $9500 f. o. b. Astoria. We would therefore recommend that we, by the adoption of this report, be authorized to enter into contract with A. G. Long, Agent of the American-LaFrance Fire Engine Company for one type 12, six cylinder Combination Pump Hose and Chemical Car for the sum of $9500.00.

"In connection with this report, we would say that it was the intention of the Council last year that another piece of auto apparatus should be bought this year, and the Committee on Ways and Means provided for the same in the levy and the taxes were collected on that basis. We believe it will be a wise investment to purchase this piece of apparatus, as along with the hose and chemical we will have a powerful pump, should the occasion demand it at any time it might pay for itself in a short time.

"If we do not purchase at this time it will mean that we will have to levy a large tax again next year, or else not add any to the department's efficiency with apparatus. If we buy now we can cut down the levy for next year a very considerable amount. While it is true that we have expended a large amount for the department in the last few years in buying apparatus, we believe the reduction in

insurance will more than offset the same in a short time.

"Charles Wilson,
"John Nordstrom,
"Karl Knobloch,
"Committee on Fire and Water."

That said report was duly received by said Common Council and read in open session, and thereupon a motion was made by a member of said Common Council that the said report and recommendations therein contained be adopted, and said motion having been stated by the Mayor to the said Common Council, was adopted by the unanimous vote of the said Common Council and the members thereof.

VII.

That pursuant to said authorization by the Common Council of the said defendant city on the 4th day of August, 1913, the said Committee on Fire and Water on the 6th day of August, 1913, entered into a contract in writing, which, omitting the specifications and guarantees attached thereto, was and is in words and figures as follows, to-wit:

"THIS AGREEMENT, Made by and between the AMERICAN-LaFRANCE FIRE ENGINE COMPANY, Inc., party of the first part, hereinafter called the Company, and THE CITY OF ASTORIA, OREGON, party of the second part, hereinafter called the Buyer.

"WITNESSETH: That the Company agrees to sell upon the conditions which are below written the apparatus and equipment hereinbefore described, all of which are to be in accordance with the specifications and guarantees attached, and which are made a part of this agreement and contract.

"Delivery is to be made on cars at Astoria, Oregon, and shipment to be made within about 60 working days after receipt and approval of this contract, duly executed, or as soon thereafter as is consistent with good workmanship and proper painting, subject to delays resulting from any causes beyond the control of the Company.

"The Buyer agrees to purchase and pay for the aforesaid property, delivered as aforesaid, the sum of Nine Thousand Five Hundred Dollars ($9,500.00) to be paid to the American-LaFrance Fire Engine Company or its authorized agent as stated below, with interest at the rate of six per cent per annum upon any sum not so paid from the time such payment becomes due until same is paid. No payments to be made to agents except on presentation in writing of an express power of attorney to accept payment.

"Terms of payment to be:

"Nine Thousand Five Hundred Dollars in cash within 15 days after delivery and acceptance of the apparatus and equipment.

"Witness our hands and official seals this 6th day of August, 1913.

"American-LaFrance Fire Engine Company, Inc.,
"Party of the first part,
"By A. G. Long, Genl. Agt.

"The City of Astoria,
"By Charles Wilson, Ch.,
"K. Knobloch,
"John Nordstrom,
"Fire and Water Committee."

That said contract was duly filed on the day it was executed with the Auditor and Police Judge of the said defendant city, said Auditor and Police Judge being also and ex-officio the clerk of the said Common Council. That the said specifications attached to the said contract provided for the construction by plaintiff for the said defendant city of one American-LaFrance triple combination pumper, hose and chemical motor car, type 12, to be built in accordance with the specifications attached to said contract.

VIII.

That a copy of said contract was on the execution thereof duly forwarded by mail to this plaintiff, which immediately accepted the same and entered upon the work of constructing and providing the said apparatus, and the same was duly con-

structed by this plaintiff pursuant to the terms of the said contract in all respects and was shipped from the factory of the plaintiff in the State of New York to the said defendant city, where it arrived on the —— day of January, 1914. And thereafter on the 31st day of January, 1914, the said Committee on Fire and Water duly made and submitted to the said Common Council a report in words and figures as follows, to-wit:

"Astoria, Oregon, January 31st, 1914.

"To the Mayor and Council.

"Gentlemen:

"We, the Committee on Fire and Water, beg to report that the triple combination pump, chemical and hose car, that we contracted for with the American-LaFrance Fire Engine Company, through their agent, Mr. A. G. Long, is acceptable in every point as was fully demonstrated in the various tests that it was put in this city on Friday, January 23rd, and this test showed to us and all present on that date, that with this apparatus the east and west ends of the city will have some fire protection, a thing that they have not under present and past conditions, and we therefore recommend the passage of the ordinance providing for the payment of the bill for the same.

"Respectfully submitted,

"Charles Wilson,

"John Nordstrom,

"Karl Knobloch,

"Committee on Fire and Water."

That said report of January 31st, 1914, duly came before and was received by the Common Council of said defendant city at a regular session thereof duly held on the 2nd day of February, 1914, and said report having been read to the said Common Council by the Clerk thereof, thereupon a motion was made by a member of the said Common Council that the said report be adopted, and the roll being called on said vote, six members of said Common Council voted for and in favor of said motion and three members of the said Common Council voted against said motion, and thereupon the motion was declared duly carried by the presiding officer of the said Common Council. That pursuant to said action of said Common Council in adopting the report last aforesaid, an ordinance was duly introduced in said Council and was on the 2nd day of February, 1914, duly passed by said Council, which ordinance required the Auditor and Police Judge of the said defendant city to draw a warrant in the sum of $9500.00, payable to this plaintiff in payment of the purchase price of said apparatus. That said ordinance last mentioned was duly submitted to the Mayor of said defendant city for his approval and said Mayor thereafter returned said ordinance to the said Common Council without his approval, and the said ordinance was by said Mayor vetoed.

IX.

That on the arrival of said fire apparatus at the said City of Astoria aforesaid the same was duly tendered by this plaintiff to the said defendant city and was delivered to said city at its fire headquarters in the said city. That the said city now refuses to accept or pay for said apparatus or any thereof on the ground that the purchase thereof was not authorized by any ordinance of said city. That this plaintiff has duly performed all the terms, provisions and stipulations of said contract on its part to be performed and has duly presented to the Common Council aforesaid a statement of its demand for the purchase price of the said apparatus in the sum of $9500.00 and has demanded payment thereof of said Common Council and of said city, but to pay the same or to make any provision for the payment thereof the said City of Astoria and said Common Council refused and still refuse.

Wherefore, The plaintiff demands judgment against the defendant for the sum of $9500.00, together with interest thereon at the rate of six per cent per annum from the 19th day of January, 1914, together with its costs and disbursements of this action.

Fulton & Bowerman,
Attorneys for Plaintiff.

STATE OF OREGON,)
) ss.
County of Multnomah.)

I, A. G. Long, being first duly sworn, depose and say, that I am the agent of the plaintiff in the above entitled action and that the above and foregoing complaint is true as I verily believe.

A. G. Long.

Subscribed and sworn to before me this 12th day of May, 1914.

(Notarial Seal) C. W. Fulton,

Notary Public for the State of Oregon.

Filed May 16, 1914.
A. M. Cannon, Clerk.

And afterwards, to-wit, on the 17th day of June, 1914, there was duly filed in said Court, and cause, a Demurrer to Complaint, in words and figures as follows, to-wit:

DEMURRER.

Now comes said defendant and demurs to the complaint filed and served by the plaintiff herein, and for cause of demurrer alleges that said complaint does not set forth a cause of action.

A. W. Norblad,
Attorney for Defendant.

STATE OF OREGON,)
) ss.
County of Clatsop,)

I, A. W. Norblad, do hereby certify that I am the attorney for said defendant; that the within and foregoing demurrer is in my opinion well found in law.

Dated this 16th day of June, 1914.

A. W. Norblad,
Attorney for Defendant.

Filed June 17, 1914.
A. M. Cannon, Clerk.

And afterwards, to-wit, on Monday, the 7th day of December, 1914, the same being the 31st judicial day of the regular November term of said Court; present, the Honorable Charles E. Wolverton, United States Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER OVERRULING DEMURRER.

This cause was heard by the Court upon the demurrer to the complaint herein and was argued by Mr. Alex Bernstein, of counsel for the plaintiff, and by Mr. A. W. Norblad and Mr. Curtiss, of counsel for said defendant; on consideration whereof, it is ordered and adjudged that said motion be, and the same is hereby overruled.

And afterwards, to-wit, on the 7th day of December, 1914, there was duly filed in said Court, and cause, an Opinion, in words and figures as follows, to-wit:

OPINION.

Fulton & Bowerman, Portland, Oregon, for Plaintiff.

A. W. Norblad, Astoria, Oregon, and A. R. Wollenberg, Portland, Oregon, for Defendant.

Wolverton, District Judge:

This is an action to recover against the City of Astoria, on a contract entered into by and between plaintiff and the Fire and Water Committee for the city, the cost price of a six-cylinder combination pump hose and chemical car, to be used as a fire apparatus in extinguishing conflagrations in the city. The liability of the city upon the contract is challenged by demurrer to the complaint. The question presented is whether the Fire and Water Committee had the requisite power and authority to enter into the contract on the part of the city and in its behalf.

There is a miscellaneous provision in the city charter declaring that the city "is not bound by any contract, or in any way liable thereon, unless the same is authorized by city ordinance, and made in writing, and by order of the Council, signed by

the Auditor and Police Judge, or some other person duly authorized on behalf of the city." Sec. 124, Charter.

The City Council is accorded power and authority, under the charter to do numerous things (Sec. 38), among which is "to establish and maintain a fire department," to appoint fire commissioners, to make and ordain rules for the government of the department, and to provide engines and other apparatus therefor (Par. 42, Sec. 38), and to appropriate money to pay the debts, liabilities, and expenditures of the city, or any part or item thereof, from any fund applicable thereto, "Provided, that no bills shall be contracted by any person or officer of the city without first sending to the Common Council a written requisition therefor, stating the items needed with the cost thereof, and, if the council deem the supplies necessary, they shall authorize the proper committee to purchase the same." (Par. 33, Sec. 38.)

It is further provided that the power and authority given to the council by Sec. 38 "can only be exercised or enforced by ordinance, unless otherwise provided."

In pursuance of its power and authority, the City Council by ordinance created a fire department, declaring that the powers and duties thereof should be exercised by and through the Committee on Fire and Water, the committee being

composed of members of the Common Council, and it was provided, among other things, that the commissioners "shall purchase all supplies for the fire department, and order all necessary repairs, subject to the ordinances of the city."

Now, acting perhaps as the committee and the Common Council deemed they had a legal right and were empowered to do, the committee, on July 21, 1913, addressed to the Mayor and Common Council a recommendation that said committee be authorized to obtain prices for another fire apparatus, and, acting upon the recommendation, the Common Council adopted a motion authorizing the committee to act. On August 4th the committee, by a report to the Common Council recommended that it (the committee) be authorized to enter into a contract with A. G. Long, agent of the American-LaFrance Fire Engine Company, for supplying the apparatus in question. The contract was subsequently made on the part of the committee in pursuance of this authority.

It is objected to the validity of the contract that its execution on the part of the city was not authorized in conformity with the requirements of Sec. 124 of the charter.

In an analogous case in the Supreme Court of the State of Oregon, wherein it was sought to have applied the identical provision in bar of a recovery

on contract with the city, the Court held that, as the charter had conferred special power upon the Common Council touching the subject matter of the contract, the more general provision was without application. Beers vs. Dalles City, 16 Or. 334. There it was said:

> "The Council, having full power over the subject, may exercise it in any manner that may be most convenient."

And it was further said, the Court speaking through Mr. Justice Strahan:

> "I think that section was designed to apply to those cases, and only to those where an ordinance is required by the charter, and where the work is expressly required to be let to the lowest responsible bidder, after notice, as in Sec. 86 of the charter."

The principle was applied in a recent case in the Circuit Court of Appeals for this circuit (City of Forsyth vs. Crellin, 210 Fed. 835), wherein it is said:

> "Thus is provided a specific method by which the city may not only secure the work to be done, but may obligate itself to compensate the contractors for doing the work."

In the present case the fire department was created by ordinance, and the Common Council was proceeding in pursuance of its special authority to create a fire department and to provide engines

and other apparatus therefor, wherein it authorized the execution by the committee of the contract in question, and I am impressed, in the light of the case of Beers vs. Dalles City, supra, that the contract is legal and binding upon the city, and so hold.

From the complaint it appears that, in reliance upon the contract, the plaintiff constructed the apparatus in New York and shipped it to Astoria, where it was duly tested by the committee and found to be up to the requirements of the contract, so that in justice and good conscience the city ought to pay the stipulated purchase price. The city did not in the end accept or appropriate the apparatus to its own use, so that there was not an executed contract, and the city is not bound on that principle, as urged by plaintiff.

The demurrer will be overruled, and it is so ordered.

Filed December 7, 1914.

G. H. Marsh, Clerk.

And afterwards, to-wit, on the 23rd day of December, 1914, there was duly filed in said Court, and cause, an Answer, in words and figures as follows, to-wit:

ANSWER.

Now comes said defendant and answering unto the complaint of plaintiff herein, admits, denies and alleges as follows:

I.

Defendant admits each and every allegation set forth in paragraphs I, II, III, IV, V, VI, VII and VIII of said complaint.

II.

Answering unto paragraph IX of said complaint, the defendant denies that said fire apparatus was tendered to this defendant by the said plaintiff; denies that said fire apparatus was delivered to the defendant at the fire headquarters of said city or at any other place; and denies that the same was delivered to said city; and alleges that the City of Astoria never has had any contract with said plaintiff as alleged in said paragraph IX of complaint herein.

Wherefore, defendant demands that the said suit be dismissed and for its costs and disbursements herein.

A. W. Norblad,
City Attorney and Attorney for Defendant.

STATE OF OREGON,)
) ss.
County of Clatsop.)

I, Olof Anderson, being first duly sworn, depose and say that I am the Auditor and Police Judge of the City of Astoria, defendant in the above entitled cause, and that the foregoing answer is true as I verily believe.

Olof Anderson.

Subscribed and sworn to before me this 21st day of December, 1914.

A. W. Norblad,
Notary Public for the State of Oregon.

(Notarial Seal)

STATE OF OREGON,)
) ss.
County of Clatsop.)

Due service of the within Answer is hereby accepted in Multnomah County, Oregon, this 23rd day of December, 1914, by receiving a copy thereof, duly certified to as such by A. W. Norblad, the attorney for defendant.

Fulton & Bowerman,
Attorney for Plaintiff.

Filed December 23, 1914.
G. H. Marsh, Clerk.

And afterwards, to-wit, on the 28th day of December, 1914, there was duly filed in said Court, and cause, a Motion for Judgment on the Pleadings in words and figures as follows, to-wit:

MOTION FOR JUDGMENT ON PLEADINGS.

Comes now the plaintiff in the above entitled cause and moves the Court for a judgment on the pleadings as filed herein for the amount demanded in the complaint of the plaintiff herein, and shows to the Court in support of this motion that the answer of the defendant filed herein does not present any issue of fact to be tried.

Fulton & Bowerman and
Bernstein & Cohen,
Attorneys for Plaintiff.

STATE OF OREGON,)
) ss.
County of Multnomah.)

I, Alice Hornaday, being first duly sworn, depose and say, that I am a clerk in the office of Fulton & Bowerman, attorneys for the plaintiff in the above entitled cause, and that on the 28th day of December, 1914, I deposited in the U. S. Post-office at Portland, Oregon, an envelope addressed to A. Norblad at Astoria, Oregon, postage fully prepaid, and that enclosed in such envelope was a

true copy of the foregoing motion, certified to by C. W. Fulton, of attorneys for plaintiff.

Alice Hornaday.

Subscribed and sworn to before me this 28th day of December, 1914.

C. W. Fulton,
Notary Public for the State of Oregon.
(Notarial Seal)

Filed December 28, 1914.
G. H. Marsh, Clerk.

And afterwards, to-wit, on Monday, the 11th day of January, 1915, the same being the 61st judicial day of the regular November, 1914, term of said Court; present, the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

JUDGMENT.

Now, at this day, this cause comes on to be heard on the motion of the plaintiff for a judgment on the pleadings on the ground that the answer filed by the defendant tenders no issue of fact, the plaintiff appearing by Mr. C. W. Fulton and Mr. D. Solis Cohen, of counsel, and the defendant appearing by Mr. A. W. Norblad, of counsel, who stated that the denials in the answer were designed and intended only to put in issue the validity of the contract alleged in the complaint; and the

Court having heard counsel for the respective parties and being advised in the premises, allows said motion.

IT IS THEREFORE ORDERED, ADJUDGED AND CONSIDERED by the Court that the plaintiff have and recover of and from the defendant the City of Astoria the sum of $10,038.33, together with its costs and disbursements in this action, taxed at $23.15, and that execution issue therefor. Whereupon, on motion of said defendant, it is ordered that it be and is hereby allowed to amend its answer herein by interlineation. And it is further ordered that the bond to be given by said defendant on appeal herein be and the same is hereby fixed at the sum of $12,500.00.

And afterwards, to-wit, on the 3rd day of February, 1915, there was duly filed in said Court, and cause, a Petition for Writ of Error, in words and figures as follows, to-wit:

PETITION FOR WRIT OF ERROR.

Now comes the City of Astoria, a municipal corporation of the State of Oregon, plaintiff in error, by A. W. Norblad, its attorney, and says: That on the 11th day of January, 1915, a judgment in the sum of $10,038.33, and for costs and disbursements herein, was by the Court duly entered against the said defendant and in favor of the said plaintiff, as aforesaid, and that in said judg-

ment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more fully appear in detail from the assignment of errors, which is filed with this petition.

Wherefore, this defendant prays that a writ of error issue in its behalf to the United States District Court of Appeals for the 9th Circuit, for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Court of Appeals.

Dated this 3rd day of February, 1915.

A. W. Norblad,
Attorney for Defendant.

Filed February 3, 1915.
G. H. Marsh, Clerk.

And afterwards, to-wit, on the 3rd day of February, 1915, there was duly filed in said Court, and cause, an Assignment of Errors, in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS.

Now comes the said defendant, the City of Astoria, a municipal corporation, and in connection with its petition for a writ of error in the above entitled action, says that there was error on the part of the District Court of the United States for

the District of Oregon in regard to the matters and things hereinafter set forth, and therefore, the defendant makes this its

ASSIGNMENT OF ERRORS.

I.

That the said District Court erred in allowing the motion made by the plaintiff, for a judgment on the pleadings.

II.

That the said District Court erred in holding that the answer of the defendant, filed in said cause, did not present any issue of fact to be tried.

III.

That the said District Court erred in allowing said motion for judgment on the pleadings and giving a judgment against said defendant.

IV.

That the said District Court erred in not sustaining the defendant's demurrer interposed in said cause.

V.

That the said District Court erred in not dismissing said action.

VI.

That the said District Court erred in rendering judgment in favor of the plaintiff and against the defendant, for the reason that the same is contrary to the law.

Wherefore, the said defendant, plaintiff in error, prays that the judgment of the District Court of the United States for the District of Oregon, in the above entitled cause, be reversed and that the said action may be dismissed.

A. W. Norblad,
Attorney for Defendant.

Filed February 3, 1915.
G. H. Marsh, Clerk.

And afterwards, to-wit, on Wednesday, the 3rd day of February, 1915, the same being the 81st judicial day of the regular November, 1914, term of said Court; present, the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER ALLOWING WRIT OF ERROR.

On the 3rd day of February, 1915, came the above named defendant, by A. W. Norblad, its attorney, and files herein and presents to the Court, its petition, framed for the allowance of a writ of error and intended to be urged by the de-

fendant, praying also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered on the 11th day of January, 1915, duly authenticated, may be sent to the United States Circuit Court of Appeals for the 9th Judicial Circuit, and that such other and further proceedings may be had as may appear in the premises; upon consideration hereof, the Court does allow the writ of error, the supersedeas bond, if such bond be given by said defendant, to be in the sum of $12,500.00.

Chas. E. Wolverton, Judge.

Filed February 3, 1915.
G. H. Marsh, Clerk.

And afterwards, to-wit, on the 3rd day of February, 1915, there was duly filed in said Court, and cause, a Bond on Writ of Error, in words and figures as follows, to-wit:

BOND.

KNOW ALL MEN BY THESE PRESENTS:

That we, the City of Astoria, a municipal corporation of the State of Oregon, and the National Surety Company, a corporation of New York, duly authorized by law to transact a surety business in the State of Oregon, are held and firmly bound unto the American-LaFrance Fire Engine Company, a corporation, in the full and just sum of

$12,500.00 to be paid to the said American-LaFrance Fire Engine Company, its attorneys, successors or assigns, to which payment well and truly to be made, we bind ourselves and our successors jointly and severally by these presents.

Signed and dated this, the 3rd day of February, 1915.

Whereas, lately at a regular term of the District Court of the United States for the District of Oregon, setting at Portland in said District, in a suit pending in said Court between the American-LaFrance Fire Engine Company, a corporation, plaintiff, and the City of Astoria, a municipal corporation of the State of Oregon, defendant, cause No. 6406 on the law docket of said Court, final judgment was rendered against the said City of Astoria, a municipal corporation of the State of Oregon, for the sum of $9500.00 with interest thereon at the rate of six (6) per cent per annum, from the 19th day of January, 1914, together with costs and disbursements in said suit, taxed at the sum of $40.00, and the said defendant has obtained a writ of error and filed a copy thereof in the clerk's office of said Court, to reverse the said judgment of said Court in the aforesaid suit, and a citation directed to the said American-LaFrance Fire Engine Company, a corporation, defendant in error, citing him to be and appear before the United States Circuit Court of Appeals for the

9th Circuit, to be holden at San Francisco, in the State of California, according to law, within thirty (30) days from the date hereof.

Now the condition of the above obligation is such that if the said City of Astoria shall prosecute its writ of error to effect and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

In Witness Whereof, the said principal has hereunto set its hand by its duly authorized Auditor and Police Judge and affixed the seal of said municipal corporation, and the said surety has caused these presents to be signed by its Resident Vice President and its Resident Assistant Secretary, and its corporate seal to be attached hereto this 3rd day of February, 1915.

The City of Astoria, a municipal corporation,

By Olof Anderson (Seal)
Its Auditor and Police Judge.
(Seal of City of Astoria)

The National Surety Company, a corporation,
By Mark Hubbert (Seal)
Resident Vice President.
M. O. Mauer (Seal)
Resident Asst. Secretary.
(Seal of National Surety Company)

Witnessed by
A. W. Norblad
E. M. Houghton

Examined and approved this 3rd day of February, 1915.

Chas. E. Wolverton, Judge.

Filed February 3, 1915.
G. H. Marsh, Clerk.

UNITED STATES OF AMERICA,)
) ss.
District of Oregon.)

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record upon Writ of Error in the case in which the American-LaFrance Fire Engine Company is plaintiff, and defendant in error, and the City of Astoria is defendant, and plaintiff in error, in accordance with the law and the rules of Court, and that the said transcript is a full, true and correct transcript of the record and proceedings had in said Court in said cause, as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript is $———— for Clerk's fees for preparing the transcript of record, and $———— for printing said record, and that the same has been paid by the said plaintiff in error.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Portland in said District this —— day of ————, 1915.

Clerk.

No. 2579.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CITY OF ASTORIA
(A municipal corporation)
Plaintiff in error,

vs

AMERICAN LA-FRANCE FIRE ENGINE COMPANY, a corporation,
Defendant in error.

BRIEF FOR PLAINTIFF IN ERROR

A. W. Norblad,
Attorney for plaintiff in error.

F. C. Hesse and J. T. Jeffries of counsel.

Fulton and Bowerman and Bernstein and Cohen,
Attorneys for defendant in error

Filed this .....day of April, 1915

Frank D. Monckton, Clerk

By ..... Deputy Clerk.

No. 2579.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CITY OF ASTORIA
(A municipal corporation)
Plaintiff in error,

vs

AMERICAN LA-FRANCE FIRE ENGINE COMPANY, a corporation,
Defendant in error.

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT OF THE CASE

This is an action instituted by the American-La France Fire Engine Company, a corporation, against the City of Astoria, Oregon, on a contract entered into between the American-La France Fire Engine Company, a corporation, and the Fire and Water Committee of the Common Council of the City of Astoria, for the sum of $9500.00 the purchase price of a six cylinder combination pump-hose and chemical auto car, to be used as a fire apparatus by the Fire Department of said City in extinguishing fires therein.

On the 21st day of July, 1913, the Committee on Fire and Water presented a communication to the Common Council, in words and figures as follows:

"Astoria, Oregon, July 21st, 1913.

To the Mayor and Council.

Gentlemen:

In connection with the recommendation of the Chief of the Fire Department we would recommend that we be authorized to get prices on another auto fire apparatus and submit them with our recommendations to the next meeting of the Council.

Charles Wilson.
Karl Knobloch.
John Nordstrom.
Committee on Fire and Water."

On the date mentioned in the communication, it was received by the Common Council in regular session and thereupon a verbal motion was made, seconded and carried that the Committee be authorized to secure prices and report the same to the Council, together with its recommendation. Thereafter, on the 4th day of August, 1913, the Common Council of said City met in regular session and at such meeting, the Committee on Fire and Water submitted its report, in words and figures as follows:

"Astoria, Oregon, August 4th, 1913.

To the Mayor and Council,

Gentlemen:

In accordance with the action of last meeting we herewith submit the cost of a piece of auto apparatus.

A combination wagon, single tank, will cost $5500.00; with double tanks $5800. A triple combination pump hose and chemical, the size we think proper, will cost $9500.00 F. O. B. Astoria. We

would therefore recommend that we, by the adoption of this report, be authorized to enter into contract with A. G. Long, Agent of the American-La France Fire Engine Co. for one type 12, six cylinder Combination Pump Hose and Chemical Car for the sum of $9500.00.

In connection with this report, we would say that it was the intention of the Council last year that another piece of auto apparatus should be bought this year, and the Committee on Ways and Means provided for the same in the levy and the taxes were collected on that basis. We believe it will be a wise investment to purchase this piece of apparatus, as along with the hose and chemical we will have a powerful pump, should the occasion demand it at any time it might pay for itself in a short time.

If we do not purchase at this time it will mean that we will have to levy a large tax again next year, or else not add any to the department's efficiency with apparatus. If we buy now we can cut down the levy for next year a very considerable amount. While it is true that we have expended a large amount for the department in the last few years in buying apparatus, we believe the reduction in insurance will more than off set the same in a short time.

Charles Wilson
John Nordstrom
Karl Knobloch
Committee on Fire and Water."

That said report was duly received by the Common Council and read in open session and thereupon, a verbal motion was made by a member of the Common Council that the said report be adopted by and it was thereupon adopted by the unanimous vote of the Common Council. Two days thereafter, and on the 6th day of

August, 1913, the said Committee on Fire and Water of said Common Council of said Plaintiff in error, entered into a contract in writing, which, omitting the specifications and guarantees attached thereto, was in words and figures as follows, to-wit:

"THIS AGREEMENT, Made by and between the AMERICAN-LA FRANCE FIRE ENGINE COMPANY, Inc. party of the first part, hereinafter called the Company, and CITY OF ASTORIA, OREGON, party of the second part, hereinafter called the Buyer.

WITNESSETH: That the Company agress to sell upon the conditions which are below written the apparatus and equipment hereinbefore described, all of which are to be in accordance with the specifications and guarantees attached, and which are made a part of this agreement and contract.

Delivery is to be made on cars at Astoria, Oregon, and shipment to be made within about 60 working days after receipt and approval of this contract, duly executed, or as soon thereafter as is consistent with good workmanship and proper painting, subject to delays resulting from any causes beyond the control of the Company.

The Buyer agrees to purchase and pay for the aforesaid property, delivered as aforesaid, the sum of Nine Thousand Five Hundred Dollars ($9,500.00) to be paid to the American-La France Fire Engine Company or its authorized agent as stated below, with interest at the rate of six per cent per annum upon any sum not so paid from the time such payments become due until same is paid. No payments to be made to agents except on presentation in writing of an express power of attorney to accept payment.

Terms of payment to be:

Nine Thousand Five Hundred Dollars in cash within fifteen days after delivery and acceptance of the apparatus and equipment.

Witness our hands and official seals this 6th day of August, 1913.

AMERICAN-LA FRANCE FIRE ENGINE COMPANY, Inc.
Party of the first part
By A. G. Long, Genl Agt.

THE CITY OF ASTORIA
By Charles Wilson, Ch.
K. Knobloch
John Nordstrom
Fire and Water Committee."

On the same day the contract was executed and filed with the Auditor and Police Judge of said City.

The powers of the Council of the City of Astoria are set out in Section 38 of the Charter, which provides as follows:

Sec. 38: THE COUNCIL HAS POWER AND AUTHORITY WITHIN THE CITY OF ASTORIA:

Then follows fifty-seven sub-divisions defining the powers of the Council. Sub-division 42 of the powers being as follows:

TO MAINTAIN A FIRE DEPARTMENT

Par. 42. To make regulations for the prevention of accident by fire; to organize, establish and maintain a fire department, whether paid of volunteer; to appoint three competent persons as fire commissioners, and to make and ordain rules for the government of the fire department; to provide engines and other apparatus for the department.

Section 39 of the Charter of the City of Astoria provides as follows:

POWER TO BE EXERCISED BY ORDINANCE

Section 39. The power and authority given to the Council by Section 38 can only be exercised or enforced by ordinance, unless otherwise provided, and a majority of the Council may pass any ordinance or make any by-law not repugnant to the laws of the United States or of this state, necessary or convenient for the carrying such power and authority, or any part thereof into effect, and as may be necessary to secure the peace and good order of the city, and the health of its inhabitants.

Sub-division 33 of Section 38 of the Charter of the City of Astoria, provides as follows:

TO CONTRACT DEBTS—OFFICERS NOT TO BE INTERESTED IN CONTRACTS

Par. 33. To appropriate money to pay the debts, liabilities and expenditures of the city, or any part or item thereof, from any fund applicable thereto; PROVIDED, that no bills shall be contracted by any person or officer of the city without first sending to the Common Council a written requisition therefor, stating the items needed with the cost thereof, and, if the Common Council deem the supplies necessary, they shall authorize the proper committee to purchase the same; PROVIDED, that in case of an emergency the Committee on Fire and Water, and Streets and Public Ways, may incur indebtedness not to exceed $100; PROVIDED FURTHER, that neither the Mayor, nor any member of the Common Council, nor any officer of the City of Astoria, shall either directly or indirectly enter into a contract with the city, nor furnish supplies or provisions to the city. If the Mayor or any member of the Common Council or any officer of the city, shall violate the provisions of the City Charter, his office will be deemed vacant.

Section 124 of the Charter of the City of Astoria provides as follows:

CONTRACTS AUTHORIZED BY ORDINANCE

Sec. 124. The City of Astoria is not bound by any contract or in any way liable thereon, unless the same is authorized by city ordinance, and made in writing, and by order of the Council, signed by the Auditor and Police Judge, or some other person duly authorized, on behalf of the city. But an ordinance may authorize any officer or agent of the city, naming him, to bind the city, without a contract in writing, for the payment of any sum of money not exceeding one hundred dollars.

Section 44 of the Charter of the City of Astoria provides as follows:

Approval of Ordinance.

Sec. 44. Upon the passage of any ordinance, the enrolled copy thereof atttested by the Auditor and Police Judge, shall be submitted to the Mayor by the Auditor and Police Judge, and if the Mayor approve the same, he shall write upon it "approved" with the date thereof, and sign it with his name of office, and thereupon, unless otherwise provided therein, such ordinance shall become law and of force and effect.

Section 45 of the Charter of the City of Astoria provides as follows:

POWER TO VETO ORDINANCE

Sec. 45. If the Mayor does not approve an ordinance so submitted, he must, within ten days from the receipt thereof, return the same to the Auditor and Police Judge with his reasons for not approving it; and if the Mayor do not so return it such ordinance shall become law as if he had approved it.

Section 46 of the Charter of the City of Astoria provides as follows:

PASSAGE OVER VETO

> Sec. 46. Upon the first meeting of the Council after the return of an ordinance from the Mayor, not approved, the Auditor and Police Judge shall deliver the same to the Council with the message of the Mayor, which must be read, and such ordinance shall then be put upon its passage again, and then, if two-thirds of all members constituting the Council, as then provided by law, vote in the affirmative, it shall become a law without the approval of the Mayor, and not otherwise.

The question presented upon this writ of error is whether the Fire and Water Committee of said Common Council had the power and authority to create such an indebtedness and enter into such a contract as it did on the part of the City of Astoria and in its behalf, without an Ordinance passed in due form and order, authorizing it so to do.

The lower Court sustained the authority of the Fire and Water Committee, maintaining its authority to enter into such contract and from this decision the City of Astoria prosecutes this writ of error, and the matter is now before your Honors for final decision and determination.

ASSIGNMENT OF ERRORS

IN THE DISTRICT COURT OR THE UNITED STATES FOR THE DISTRICT OF OREGON

Suit at Law No. 6406.

AMERICAN-LA FRANCE FIRE ENGINE COMPANY, a corporation,
Plaintiff

vs

THE CITY OF ASTORIA, a municipal corporation of the State of Oregon.
Defendant.

Now comes the said defendant, the City of Astoria, a municipal corporation, and in connection with its petition for a writ of error in the above entitled action, says that there was error on the part of the District Court of the United States for the District of Oregon in regard to the matters and things hereinafter set forth, and therefore, the defendant makes this its

ASSIGNMENT OF ERRORS

I.

That the said District Court erred in allowing the motion made by the plaintiff, for a judgement on the pleadings.

II

That the said District Court erred in holding that the answer of the defendant, filed in said cause, did not present any issue of fact to be tried.

III

That the said District Court erred in allowing said mo-

tion for judgment on the pleadings and giving a judgment against said defendant.

IV.

That the said Court erred in not sustaining the defendant's demurrer interposed in said cause.

V.

That the said District Court erred in not dismissing said action.

VI.

That the said District Court erred in rendering judgment in favor of the plaintiff and against the defendant, for the reason that the same is contrary to the law.

WHEREFORE, the said defendant, plaintiff in error, prays that the judgment of the District Court of the United States for the District of Oregon, in the above entitled cause, be reversed and that the said action may be dismissed.

A. W. NORBLAD,
Attorney for defendant.

ARGUMENT

This question must be viewed from many different angles, and the invalidity of the contract results from the fact that:

1—The power to make a contract is a legislative power and cannot be delegated.

2.—Legislative power conferred by the charter of a city must, in the absence of an express exception, be exercised by ordinance.

3.—The charter prescribes the mode and manner of executing contracts, prescribing certain formalities of execution, after proper authorization by ordinance; and these formalities being mandatory, no contract is binding unless they are observed.

4.—The Fire and Water Committee had no power to contract and had no authority to sign a contract on behalf of the city.

(1) The power to make a contract is a legislative power and cannot be delegated.

It will be conceded that the mode of contracting prescribed by the City's Charter is the measure of the City's power to contract. The Charter is a grant of power and the municipality possesses only the powers which its charters confers upon it, either expressly or as incidental to the execution of its powers.

City of Corvallis vs Carlili, 10 Or. 139.

Mut. Ins. Co. vs Baker City, 58 Or. 315.

A municipal corporation possesses and exercises the following powers, and no others: First, those granted in express words; second, those necessarily of fairly implied in and incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient but indispensable.

Farwell vs City of Seattle, 43 Wash. 141.
So. Pasadena vs Pasadena Co. 152 Cal. 602.

The powers of a municipal corporation are either legislative or administrative. Between these there is a vast difference, which the courts have consistently recognized in dealing with either municipalities or with public officers. The distinction presents itself most strongly in the present case. It meets us fairly and squarely at the threshold of this litigation; for upon the character of this action of the council herein, whether same was legislative of ministerial—depends the entire structure of the opposition. Whether the power exercised by the Committee on Fire and Water in entering into this contract, being in its nature a legislative act, could not as such be delegated.

Let us first enquire into what is meant by legislative powers, and by ministerial or executive powers.

Legislative Power is that through which the municipality creates and defines rights and duties, prescribed rules of conduct and regulates the relations among individuals, and between them and the city.

Executive Power is that which is concerned with the enforcement of these laws.

The distinction between Legislative and Executive Power is will and exeution. The peculiar functions of the legislative department is to deliberate, to consult upon the various needs of society, and to formulate the will of the municipality in respect to the multitudinous affairs which require to be regulated. The primary function of the executive, on the other hand, is to administer and enforce the will of the City as thus formulated. Executive power is thus used in the sense of ministerial duty, in respect to which nothing is left to discretion. A simple, definite duty, arising upder conditons admitted or found to exist, and imposed by law, the performance of which may, in proper case, be required by judicial process. Legislative power, on the other hand, is beyond enforcement by judicial process.

It is a fundamental principle of law that legislative powers cannot be delegated by a corporation unless authority to delegate is especially granted by statute, nor can it divest itself of the discretion vested in it by the authority which created it.

State vs Garibaldi, 44 La. 809.

Exparte Francis, 165 S. W. 172 and authorities cited.

All corporations, of whatever kind, are moulded and controlled, both as to what they may do and the manner in which they may do it, by their charters or acts of incorporation which to them are the laws of their being and which they can neither dispense with nor alter. The Council of a City is an agent of the City with delegated power; and in the absence of statutory authority

to delegate such powers to others it has no right to do so.

City of Louisville vs Parsons, 150 S. W. (Ky) 498.

In Thompson vs Board of Trustees, 144 Cal. 281, it was declared that the Board could not divest itself for any length of time, of legislative and discretionary power vested in it by the general laws. In view of this principle of law, the question necessarily arises, as to the authority of this council to delegate its powers to a subordinate committee? If the acts delegated are legislative, it certainly did not have any such power.

The charter does not attempt to define what acts are intended to be embraced by the term legislative powers; nor does it define the meaning of the term administrative powers. To determine its classification we must look to the nature or character of the act itself. The distinction between the powers of a municipal corporation to create and its power to execute—and this is virtually what is meant by legislative powers—considered apart from any express or implied provision of the charter, is well recognized. The council acts in a dual capacity—in a public and political character, exercising subordinate legislative powers and in its private character exercising the powers of an individual or private corporation. Legislative powers imply judgment and discretion upon the part of those who exercise them, and a special confidence and trust upon the part of those who confer them.

Rugles vs Collier, 43 Mo. 353.

Regard should be had, not so much to the nature and character of the various powers conferred as to the ob-

ject and purpose the legislature had in conferring them. If granted for a public purpose exclusively they belonged to the corporate body and its public, political and municipal character. But if the grant is for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation is regarded as a private company.

City of Seattle vs Stirrat, 55 Wash. 560.

Bailey vs New York, 3 Hill (N. Y.) 531.

There can be no question of the character of the power conferred upon the City of Astoria to establish a fire department for that city. It was of a purely public character, for the comfort and protection of its inhabitants. In Jones vs Schuylkill L & R Co. 202 Fed. 164, Legislative acts were declared to be permanent regulations for the government of the borough, granting of privileges to occupy streets, **and the creation of liability by contract**; whilst under ministerial acts were classed the transaction of current business, the ordinary administration of municipal affairs and the **awarding of contracts previously authorized by ordinance.**

See also, Com. Vs Nat. Bank, 9 Pa. Super. Ct. 118.

Earl vs B, 140 Cal. 754.

Jersey City vs H, 71 N.J.L. 69, aff'g 72 N.J.L. 185.

Staub vs P, 138 Pa. 539.

Lansdowne vs Citizen's E. L. & P. Co., 206 Pa. 188.

The power, then, to authorize a contract involving liability is clearly a legislative power, and the authority to award a contract to a successful bidder under this

power is clearly the exercise of a ministerial act. This is identically the question involved in this proceeding. The making of a contract for lighting the streets was held in Los Angeles Gas Co. vs Taberman, 61 Cal. 199, an exercise of the legislative powers of the council. Authority to make alterations in the specifications for contract, was, also, held a delegation of power conferred by statute (Gratz vs City 15 Utah 67); also, exclusive power over street improvements, (Chase vs City Treas., 122 Cal. 540). So, also, in the matter of public improvements, as involving the exercise of discretion and judgment. City Mut. Ins. Co. vs Baker City, 58 Or. 306; Neill vs Gales, 152 Mo. 594, and Galendo vs Walter 8 Cal. App. 234 presents the question involved in this case. There the power to establish sewers, and to provide plans and means for their construction, had been granted the City, as the power to establish a fire department and provide for its equipment in the present case, and it was held that he city could not delegate this power, being legislative, and implying judgment and discretion, to any person or persons.

Under the city charter of St. Louis the council was empowered to put in sewers of such dimensions as might be prescribed by ordinance. Pursuant to this authorization, an ordinance was passed providing for the construction of a sewer of such dimensions and of such materials as might be deemed requisite by the City Engineer; and it was held that the council could not delegate a duty thus plainly and expressly devolved upon them to the mere discretion and caprice of an individual.

St. Louis vs Clemins, 43 N. W. 395.

Under the decisions, the council of Astoria has evidently clearly transcended its authority in delegating a power which only itself had the authority to exercise.

(2)—Legislative power conferred by the charter of a City must, in the absence of an express exception, be exercised by Ordinance.

If, therefore, the council is without authority to delegate its legislative powers, then the council itself is only authorized to exercise its powers, in the absence of express exception, by ordinance; and only in the manner and under the forms prescribed by the charter. A city speaks through its ordinances, passed and promulgated under the authority which created it.

Tharp vs Blake, 171 S. W. 549.

It is its only medium of expression. The charter requires and points out this medium; and when a contract is made through any other source it has no binding force.

Los Angeles Gas Co. vs Toberman, supra.
City of Bryan vs Page, 51 Texas 532.
Moore vs Mayor, 73 N. Y. 238.
Jones vs City of Caruthersville, 171 S. W. 660.

Let us see how far this council complied with the requirements of its charter. A brief reference to the powers and limitations imposed on the City of Astoria in this matter is therefore necessary to determine the extent of its liability and the measure of its duty in the premises.

Sec. 38 of the charter of the City of Astoria reads as follows:

"The council has power and authority within the City of Astoria (among other things) to maintain a fire department.

Par. 42—To make regulations for the prevention of accidents by fire; to organize, establish and maintain a fire department, either paid or volunteer;to appoint three competent persons as fire commissioners, and to make and ordain rules for the government of the fire department; to provide engines and other apparatus for the department.

Sec. 39—The power and authority given to the council by Sec. 38 **can only be exercised or enforced by ordinance,** unless otherwise provided; and a majority of the council may make any by-law not repugnant to the laws of the United States or of this State, necessary or convenient for the carrying such power and authority or any part thereof into effect, and as may be necessary to secure the peace and good order of the city and the health of its inhabitants.

Sec. 124—The City of Astoria is not bound by any contract or in any way liable thereon, unless the same is authorized by city ordinance and made in writing and by order of the common council signed by the Auditor and Police Judge or some person duly authorized on behalf of the City, but an ordinance may authorize any officer or agent of the City, naming him, to bind the City, without a contract in writing, for the payment of any sum of money not exceeding one hundred dollars."

After the charter was in force an ordinance was passed as follows:

"Sec. 1—That there be and hereby is organized a paid fire department of the City of Astoria, with powers and duties to be exercised by and through the committee on Fire and Water of the Common Council of said City."

Sec. 3. The Committee on Fire and Water and their successors in office shall constitute and be ex-officio fire commissioners of the fire department of the City of Astoria."

Sec. 11. The Committee on Fire and Water, the ex-officio fire commissioners, shall purchase all supplies for the fire department and order all necessary repairs **subject to the ordinances of the City of Astoria."**

"Sec. 15. The Committee on Fire and Water, the ex-officio fire commissioners, shall report to the common council at least once in each month the expenditures of the department and other matter pertaining thereto, of public interest; and shall in the month of January of each year report in detail to the Common Council, the annual receipts and expenditures of the department, including a complete inventory of all property in their charge."

These are all the provisions of the charter and the ordinances of the City affecting the question presented. **Sec. 38** confers upon the city council power to establish a fire department, to appoint persons as fire commissioners, to make and ordain rules for the gov-

ernment of the department and to procure all the necessary apparatus for the same. **Sec. 39** relates to the mode and manner in which this power shall be exercised. **Sec. 124** limits the city's liability.

Where the statute requires that an act of a municipality be done in the form of an ordinance, or if such requirement is implied by necessary or clear inference, the act can only be done by ordinance.

Nat. Bank vs Grenada, 44 F 262.
Holtz vs Sav. E. Co. 131 F 931.
City of Pensocala vs Tel. C. 49 Fla 161.
People vs M. 186 Ill. 560.
State ex rel. vs Comr. 165 Ind. 262.
Trenton vs Coyle, 107 Mo. 191.
Packard vs Ry. C. 48 N. J. Eq. 281.
Westport vs Masten 62 Mo. 647.

A resolution in such case would not suffice.

People vs M. 186 Ill. 560.
Wheeler vs Poplar Bluff, 149 Mo. 36.
Dalton vs Poplar Bluff, 137 Mo. 39.
Cape Gerardeau vs Forgan, 30 Mo. App. 556.

The charter is a grant of power, and the municipality possesses only those properties which the charter confers upon it, either expressly or incident to the execucion of its powers.

City of Corvallis vs Carlile, 10 Or. 139.
Hawthorne vs E. Portland, 13 Or. 271.
Mutual Irrigation Co. vs Baker City, 58 Or. 315.

It is a familiar rule that when a mode of exercising a power is presented, that power can only be legally ex-

ercised in that mode.

McManus vs Hornday, 99 Iowa 507.

And where the charter authorizes a municipality to provide for a public improvement by ordinance, the municipality cannot provide therefor by resolution.

Jones vs W. 124, P. 312.

If disregarding the plain mandates of its Organic law, a city enters into a contract which it had no authority to, under the charter, the city is not bound.

Jacob vs E, 132 N. Y. S. 54.

All legislation by a City must be by ordinance, whether the City acts in its governmental capacity or in its private or business capacity; and an ordinance is necessary to create an indebtedness, whether arising in a governmental capacity or in a private or business capacity.

A resolution does not justify the incurring of an indebtedness against the city, though it be assumed that the city is acting in its private or business capacity.

City of Louisville vs Parsons, supra.

When there was no prior action or appropriation made for the purchase of a street cleaning machine, the action of a committee making a contract for the purchase of the same was declared invalid.

Kindling Mch. Co. vs York City, 54 Pa. Super Ct. 318.

In the transactions of all acts of a permanent nature involving a rule of conduct or permanently affecting the government and welfare of the city, the corporation

must, of necessity evidence its action by an ordinance adopted with all the formalities prescribed by the charter or by statute.

Clafflin vs C. 178 Ill. 549.

Altamont vs Ry. Co., 184 Ill. 47.

People vs M, 186 Ill. 560.

McDowell vs People, 204 Ill. 499.

London Mills vs Wheeler, 208 Ill. 289, aff'g 105 Ill. 166

Nor can a city make a contract for improvement, except in the manner specifically pointed out in the charter.

N. P. L. Mftg. Co. vs E. Portland, 14 Or. 3.

N. P. Term. Co. vs. Portland, 14 Or. 24.

Allen vs Portland, 35 Or. 420.

A resolution for the improvement of a street was insufficient.

San Jose Impr. Co. vs Augeras, 106 Cal. 498.

When the charter authorizes the passage of any ordinance necessary to carry into effect powers granted by a charter, it contemplates the passage of an ordinance whenever legislative action by such municipality establishes a permanent rule of conduct or is to have a continuing effect.

Attamonte vs Ry. Co. 184 Ill. 47.

The grades of streets can only be established by ordinance, a resolution for the purpose being insufficient.

McDowell vs People, supra.

If the requirements of an ordinance is implied by nec-

essary inference for a municipal act, a resolution would not answer.

People vs M. 186 Ill 506.

The Charter of Sellwood gave the council power to provide for the erection of a city jail, as the charter of Dallas provided for a fire department. .The court passing upon this question (Grafton vs Sherwood, 24 Or. 118) said "Sec. 29 provides that the power and authority given by Sec. 28 can only be enforced and exercised by ordinance unless otherwise provided." The language of the charter in the present case is identical; and the court held, **that no jail could be erected without an ordinance for that purpose.** In the case of Grafton vs Sellwood, supra, an ordinance was passed, authorizing a contract, but did not take effect until after the contract had been entered into, yet the contract was declared void under he charter. Where a committee was authorized to contract for the erection of a school house at a cost not to exceed $55,000. it was held that the committee had no authority to render the city liable for a larger sum.

Turner vs Bridgeport, 55 Conn .412.

In McManus vs Hornday, 99 Iowa 507, the grading of streets was included in the general power to pass ordinances to improve the comfort and convenience of the city.

In Kipner vs Commonwealth, 49 Pa. St. 124, the authority to direct the Mayor to sign certain coupon bonds in renewal of a loan was held, in effect, to require an ordinance. The courts of Pennsylvania strictly limit the province of resolutions to acts administration, and construe statutory grant of authority in such manner as

to limit the power of the council to acts by resolutions to acts of a temporary character.

(3) **The Charter prescribes the mode and manner of executing contracts, prescribes certain formalities of executing after proper authorization by Ordinance, and these formalities being mandatory, no contract is binding unless they are observed.**

It is settled law that a municipality can never become a debtor by implication, but only by virtue of an express contract, made by its autorized officers in the manner and form providedby law.

> Leletier Fiscal Court et al vs Spangerl, 172 S. W. 498, see authorities therein cited.

Now what is the difference between an ordinance and a resolution. Why the distinction? An ordinance relates to questions or subjects of permanent or general character; whilst, a resolution relates to those which are temporary and restrictive in their operation and effect. The principal difference is in the mode of adoption. An ordinance must be enacted with all the formality required by the charter. While a resolution may be adapted with less formality and its legal effect determined less strictly, unless the charter otherwise provides.

> City of Alma vs Guarantee Sav. Bank, 60 F. 203.
> City of Lincoln vs Sun Co., 50 F 756.
> City of Central vs Sears, 2 Colo. 589.

Ordinances being about the most important and solemn acts of a municipal corporation, it is essential to their validity that they shall be adopted in the manner pre-

scribed by the charter. It may be laid down as a general rule, that all charter or statutory requirements as to the method in which an ordinance shall be introduced, and the manner in which it shall be considered, are, when reasonably calculated to induce deliberation, mandatory in their nature and must be complied with.

When the mode of contracting is specially and plainly prescribed and limited, that mode is exclusive and must be pursued, or the contract will not bind the corporation. "The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated."

Head vs Ins. Co. 2 Grand. 127; approved, Bank vs S, 12 Wheat, 64.

Butter vs C, 7 Gray (Mass) 12.

Bladen vs P, 60 Pa. St. 464.

McCracken vs City of San Fran. 16 Cal. 591.

Bermental vs San F. 21 Cal. 351.

Zottman vs San F. 20 Cal. 96.

Argenti vs San F. 16 Cal. 255.

Paris Tp. vs C. 80 Pa. St. 569.

When a committee was empowered to contract for the erection of a building at a price not to exceed a specified sum, they possessed no power to contract for a larger sum, and the person contracting with them were bound to take notice of the extent of their powers.

Turney vs Bridgeport, 55 Conn. 412.

Where the City Charter empowered the city council to pass all proper and necessary ordinances for the regulation and sale of city property, and prescribed the mode and manner of doing so a resolution did not comply with the requirements of the Charter. In Cimpher vs City of Portland, 121 Pac. 374, this rule was maintained, holding that "a resolution did not comply with any of the requirements of the charter. It did not purport to be an ordinance at all, nor was it in the form prescribed for ordinances. No ordinance providing for the sale of such property or fixing the terms thereof was ever passed. If it be conceded that the city had the power to grant or sell for what appears to have been private use, or dispose of it at all, it could do so only in the manner prescribed by its charter. As an attempted disposition of such land the resolution was a wide departure from the prescribed mode and was wholly ineffectual." Again in Shepard vs City of Missoula, 141 Pa. 544, the court said: "When the mode of exercising any power in pointed out in the statute granting it, the mode thus prescribed must be pursued in all substantial particulars. The statute having defined the measure of the power granted, and, also, the mode by which it is to be exercised, the validity of the action of the legislative body must be determined by an answer to the inquiry whether it has departed substantially from the mode prescribed. When the council does nothing but invite proposals and accepts bids, there is no compliance with the chartered provisions."

Times Pub. Co. vs Weatherby, 139 Cal. 618.

In the present case there was nothing but a simple

motion instructing the committee on Fire and Water to investigate and report the result of its investigation to the council. It will not be contended that this was a compliance with the provisions of the Charter. Considering the action of the Council in every possible light, it fails to show a substantial compliance with the provisions of the charter, although such provisions were mandatory.

This court said in Beer vs Dallas City, 16 Oregon 334, relied upon by the lower court in its interpretation of this very contract, that this section (Sec. 39) of the charter, was designed to apply to those cases, and only to those, where an ordinance was required by the charter; and its application ought to be so limited that the officers of the corporation could not exceed their authority as defined in the charter, nor fail to pursue the requirements of the statute under which they were acting.

The Judge aqus, alluding to a previous decision of this court, quoted as follows:

"I think that section was designed to apply to those cases, and only to those, when an ordinance is required by the charter, and when the work is expressly required to be let to the lowest responsible bidder, after notice, as in Sec. 86 of the charter." Does not this principle apply in this case? Are not the charter provisions positive and mandatory? Is it not specifically provided in the charter that this work shall only be done under an ordinance of the Council? If an opposite view of this matter is taken by the Court, what becomes of Sec. 39? What force or effect can it have on the actions of this

council? Here is an express provision providing that the power and authority conferred by Sec. 38, can only be exercised or enforced by ordinance, and we are told that its provisions apply only to cases where "an ordinance is required by the charter, or where the work is expressly required to be let to the lowest bidder." **This is not a question of justice and good conscience, but one of pure legal rights. .Not whether the city ought to pay the stipulated price, but whether she is legally bound to pay. .As a question of equity, the appellee has other methods of redress but he cannot come into court and ask that that be declared right which the public policy of the state has declared to be wrong.** The City has as much right to consideration as the private individual; and when an individual deals with a corporation it is his duty to acquaint himself with all facts, and as to whether the party with whom he is dealing has the proper authority and power to act. He acts at his own peril and if the party with whom he deals is without authority in the premises, the loss is his own.

"One rendering service to a city pursuant to a resolution of the Council, may not recover from the city authorized to act only by ordinance; since persons, contracting with a city must at their peril, inquire into the power of the city or its officers to make contract."

City of Louisville vs Parsons, 150 S. W. (Ky) 498.
City of Corvallis vs Carlile, 10 Or. 139.
I W. T. 207
Ex parte R. 4 Ala. 259.
Daly vs San Francisco, 72 Cal. 154.
Elec. Co. vs Ft. Deposit, 50 So. 802.

Elec. Co. vs Chambridge, 103 Mass. 64.
Tarrion vs L. 92 Ill. 263.
Schamn vs S 24, N. J. Eq. 143.

But did not the council exceed its authority as defined in the charter; and did it not fail to follow the requirements of the statutes under which it had power to act? It will be admitted that a charter must be strictly construed. In the Beer case, supra, controlling the decision of the lower court, the power was held to be fully and plainly conferred and that there were no rescrictions on its exercise. But does that apply here? **Sec. 38 of the Charter contains the general grant of power, but Sec. 39 declares that it can only be exercised in a certain manner.** It clearly was the intention of the legislature to control the exercise of this power to the extent that it could only be exercised by ordinance. To further emphasize this restricture, Sec. 124, reiterating its previous language, declares that it will not be bound by any contract, or in any manner made liable thereon, unless the same has been authorized by an ordinance ;and proceeding, declares how the contract must be executed in order to render the city liable. The Section further goes on to state what particular contracts should unnecessarily follow this rule, thus placing the legislature intent beyond all cavil. The purpose of the framers of this statute could not have been more clearly or more forcibly expressed. In Grafton vs Sellwood, 24 Or. 118, it was held that powers granted could only be enforced by ordinance, and where the charter provided that a contract could only be entered into by ordinance, a contract ex-

ecuted one day before the ordinance authorizing it, went into effect, was void.

(4) **The Fire and Water Committee had no power to contract, and had no authority to sign a contract on behalf of the City.**

Finally it is contended on the part of appellant that the Fire and Water Committe had no authority to contract, and were not authorized to sign a contract on behalf of the City; and that a contract so executed was utterly void and unforcible. The committee possessed no inherent powers, and whatever authority it might possess could only be received from the council, of which it was a subordinate branch. The charter provides by whom contracts may be signed. Sec. 124 provides that ordinances shall be "in writing and by order of the council signed by the Auditor and Police Judge, or some other person duly authorized on behalf of the City." Did the City Council of Astoria comply with this provision of the Charter? This contract was never signed by the Auditor and Police Judge, nor was any one else authorized by the Council by ordinance to act in behalf of the City. When a contract is directed to be executed and signed in a certain manner, and that order is not followed, the contract is invalid. In Frick vs Los Angeles, 115 Cal. 512, the Mayor was directed to sign the contract and failed to do so;—the section of the charter was held to be violated. In the present case the contract was signed by the Committee on Fire and Water. Where is the authority for the action of the Committee? The essential things to be done in executing this contract was

its preparation and its signing by the proper officials, authorized by ordinance, and its approval by the Council. Were any of these steps taken in the carying out of this contract? The record fails to show it. Were the committee authorized to sign contracts? The council certainly had no power to authorize them to so sign, except by ordinance, and no such authority has been shown. In the case above quoted, a clerk was declared incompetent to sign a contract, because he was not a person authorized to sign contracts for the city, and there was no ordinance authorizing him to do so. In Los Angeles Gas Co. vs. Toberman, supra, it was said: "As the signature of a contract in writing is no part of the duties of a Mayor, authority to sign comes from the council."

When the charter authorizes the Mayor to sign contracts, then "some other person authorized thereto" should also be some person having similar or previous authority, and such provision necessarily means previously authorized thereto by some general law or by provisions of the charter; and that the council should first pass an ordinance conferring the authority and thereafter make the order directing him to sign.

Los. Angeles Co. vs Toberman, supra.

In the case of Arnold vs City of Spokane, 6 Wash. 442, it was held "that under the provisions of a city charter providing that the city is not bound by any contract unless authorized by an ordinance and in writing, and by order of the council, signed by the City Clerk or some other person authorized by the city, officers of the city cannot bind it by contract not in writing."

Equity will not declare a city bound by a contract not executed in accordance with the requirement of the Charter.

Frick vs Los Angeles, 115 Cal. 512.

The provisions of a city's charter that it shall not be bound or be liable on any contract, unless in writing by order of the Council, and signed by the Mayor, where there has been no compliance with this provision, there was no way to protect a party from the harsh consequences which followed his neglet to have the contract executed as required by the charter.

Times Pub. Co. vs Weatherby, 139 Cal. 618.

Considering therefore, the facts in this case, as shown by the record, and the law as herein set forth, appellant contends that:

FIRST: .The power to make a contract of the nature set forth in the record is a legislative power and cannot be delegated.

SECOND: In the absence of express exception, this power can only be exercised by ordinance; and that the mode and manner of executing contracts, prescribed in the charter, is mandatory, and a failure to comply with its provisions renders a contract invalid and of no binding effect on the City; and

THIRD: When the charter provides by whom a contract shall be executed, no other person or persons have any authority to sign and execute a contract, unless the authority has been previously given by the council and that authority can only be given by ordinance.

If this method of making contracts is upheld, then upon principle, there is no reason why a Committee of the Common Council cannot bind it without any Ordinance, in an amount up to the limit of the city's indebtedness. It will play havoc with municipal affairs. The veto power given the Mayor, by the Charter of the City of Astoria, which is set forth in the Statement of the Case herein, will be held for naught. The plain charter provision which limits the power of the members of the Common Council to the method of contracting, particularly designated and set forth, will be abrogated in favor of the will of the Committee of the Council. It will readily resolve the governmental and legislative functions of the City of Astoria into a chaos. The Mayor of the City of Astoria has no vote under the Charter thereof, and will simply sit as a figure-head, presiding at the sessions of the Council, but will have no voice whatsoever, in its affairs. Five members of the Common Council of the City of Astoria can bankrupt the City by purchasing fire engines and fire equipment and supplies for its fire department, the other four members and the Mayor, and the people of the City of Astoria, will be absolutely powerless to prevent the ravages upon the City Treasury and the City funds.

We respectfully submit that when the Legislature of the State of Oregon enacted the Charter of the City of Astoria and set out Section 124 therein, wherein they specifically provided "the City of Astoria is not bound by any contract or in any way liable thereon, unless the same is authorized by City Ordinance and made in writing and by order of the Council, signed by the Auditor

and Police Judge, or some other person duly authorized on behalf of the City'' that it meant just exactly what is plainly set forth in the language used. It can admit of but one construction, it means only one thing; it does not have a double meaning. This provision was afterwards re-enacted by the peple of Astoria, under the initiative and referendum power given to the people by the Constitution of the State of Oregon. The will of the people and the will of the Mayor of the City of Astoria and the will of four councilmen would be set aside and be absolutely powerless against five members of the Common Council, if the decision of the lower court is sustained.

With these views and the authorities herein cited, appellant believes that the decisions of the lower court should be reversed, and the claim of appellee denied.

Respectfully submitted,

A. W. NORBLAD,

Attorney for the City of Astoria and attorney for plaintiff in error.

F. C. Hessee and J. T. Jeffries of counsel.

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I, A. W. Norblad, do hereby certify that I am the attorney for the Plaintiff in Error, the City of Astoria, in the within entitled cause, and that the foregoing is a true and correct copy of the brief in said matter on behalf of the said Plaintiff in error and of the whole thereof.

Dated this .....day of April, 1915.

.....
Attorney for Plaintiff in Error

2579

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CITY OF ASTORIA, a Municipal corporation of the State of Oregon,
Plaintiff in Error,

vs.

AMERICAN LA FRANCE FIRE ENGINE COMPANY, a corporation,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

A. W. NORBLAD,
F. C. HESSE and
J. T. JEFFRIES,
Attorneys for Plaintiff in Error.

FULTON & BOWERMAN,
BERNSTEIN & COHEN,
Attorneys for Defendant in Error.

Bushong & Co., Printers, Portland, Or.

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STATEMENT.

This is an action wherein the plaintiff seeks to recover against the defendant by reason of a contract entered into by and between it and the City of Astoria, for the cost price of a Six Cylinder Combination Pump Hose and Chemical Car to be used

as a part of the fire equipment in the Fire Department of the City of Astoria. The allegations of the complaint are as follows:

Plaintiff is a corporation with right to do business in the State of Oregon, and that the defendant is a municipal corporation duly chartered by the general laws of the State of Oregon; that the charter of said city provides among other things that the city council may establish and maintain a fire department; that pursuant to said authority, the said city council did, by ordinance duly set out by number and title, provide for the establishment and maintenance of a fire department in said city, and authorized a committee known as the Fire and Water Committee to manage and control that department; that the said fire and water committee reported to the city council the necessity of purchasing said apparatus consisting of a Six Cylinder Combination Pump Hose and Chemical Car for the use of the Fire Department; that the city council authorized said Committee to secure bids for same; that said committee secured bids and reported the same to the city council requesting authorization to purchase from the plaintiff herein said apparatus upon the terms as therein mentioned and to enter into a contract with the plaintiff herein to carry out said purposes; that the common council granted to said committee said authority; that thereafter pursuant to said authority a contract was entered into

by the plaintiff and by the City of Astoria signed on its behalf by all the members of the Fire and Water Committee; that said contract is set out in full in the complaint and among other things provides that the delivery of the apparatus shall be made on cars at Astoria, Oregon; that upon said contract being executed the plaintiff immediately commenced the construction of said apparatus at its factory in the State of New York and upon its completion shipped same to plaintiff addressed to the Fire and Water Committee of said City of Astoria, Oregon. That same was received by said Committee and tested; and that the committee thereupon reported to the city council that the apparatus met all the requirements of the contract and recommended the passage of an ordinance providing for the payment of same; that the report was received and upon motion same was adopted by the council; thereupon an ordinance was introduced providing for the payment of same, which ordinance was duly carried but was vetoed by the Mayor of the city and which veto was afterwards sustained; that upon the arrival of the fire apparatus in the city of Astoria same was tendered to defendant and delivered to it at its fire headquarters; that the plaintiff herein had performed all the provisions, and stipulations of contract on its part to be performed, but that the defendant refused to accept or pay for said apparatus, and that plaintiff presented its claim to the council for payment, which claim was rejected. This com-

plaint was challenged by demurrer, and after argument the demurrer was over-ruled and an opinion on the demurrer was filed herein by Wolverton, District Judge, which opinion is found in the Transcript of Record, pages 17, 18, 19, 20, 21. Thereafter the defendant answered said complaint, admitting all the allegations set forth in said complaint, and made certain denials in order to put in issue the validity of the contract. Thereupon plaintiff asked for judgment on the pleadings on the ground that the answer of defendant did not raise an issue of fact, which motion was duly heard by the court, the defendant admitting that the purpose of its denial was "designated and intended only to put in issue the validity of the contract set forth in the complaint," and the learned Judge after argument entered judgment in favor of plaintiff as prayed for in the complaint, which judgment is found on pages 25 and 26 in the Transcript of Record and to reverse which plaintiff in error has sued out a writ to this court.

ARGUMENT.

VALIDITY OF CONTRACT ONLY QUESTION IN ISSUE.

The first contention of defendant in error is that the contract is valid and binding upon the city because under the charter and ordinance passed by the City Council, another method is provided for the purchase of apparatus.

The defendant in error is in perfect accord with the principles as set forth in the brief of plaintiff in error, namely, "The Charter is a grant of power and the municipality possesses only the powers which its charters confer upon it, either expressly or as incidental to the execution of its powers," and further that a municipal corporation possesses and exercises the following powers and no others: "First, those granted in express words; second, those necessarily of fairly implied in and incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient but indispensible."

These are fundamental and need no citation of authorities to establish them.

The provisions of the charter which are found in section 38, grant to the City Council all powers to carry out the purposes of City government and among others is "to establish and maintain a fire de-

partment," and after enumerating the various powers and authority vested in the city council provides, that the power and authority given to the council by Section 38 "can only be exercised or enforced by ordinance, unless otherwise provided." In pursuance to this authority, the city council did by ordinance provide for the creating of a fire department in the city, and further provided that all the powers to be exercised in carrying on the fire department including the purchase of all supplies for the fire department should be exercised by and through a Fire and Water Committee. The Fire and Water Committee were named by the city council and were in the active control of the fire department and in the exercise of their duties as members of such Fire and Water Committee when the plaintiff herein had his dealings and made his contract with the city. The contract was finally entered into and signed by the parties in strict accordance with the method provided for in the ordinance. At all times this committee acted under the instructions of the city council, reported to it regularly and received from it its directions, and followed the methods pointed out. It is well settled that where the general method is pointed out by the charter and special powers conferred in the charter, that any action on the part of the city whereby it employed the special power would be valid and binding upon the city. This construction has been upheld by the Supreme Court of the State of Oregon and has the approval of Wolverton,

District Judge, who in the opinion filed herein on the demurrer uses this language:

"It is objected to the validity of the contract that its execution on the part of the city was not authorized in conformity with the requirements of section 124 of the Charter."

It is an analogous case in the Supreme Court of the State of Oregon, wherein it was sought to have applied to the identical provision in bar for a recovery on contract with the city, the court held that as the Charter had conferred special power upon the Common Council touching the subject matter of the contract the more general provisions was without obligation.

Beers vs. Dalles City, 16 Ore. 334; there it was said:

"The Council having full power over the subject may exercise it in any manner that may be most convenient."

nencia La France Engine Co v City of Astoria 218 Fed 480.

This especially applies in this case where the contract for fire apparatus was within the object of the creation of the corporation. The same doctrine has been upheld by this court in City of Forsyth vs. Crellin, No. 210 Fed. 835, wherein the court through Wolverton, District Judge, uses the following language:

"Thus is provided a specific method by which the

city may not only secure the work to be done, but may obligate itself to compensate the contractors for doing the work," and further in this same case uses this language: "Upon the other hand, it would seem a contractor would be entitled to his pay in pursuance also of the stipulations in the contract. The method thus prescribed in entering into a contract of the kind is complete within itself, and it would seem that no other conditions were designed to be imposed, either upon the city or upon the contractor to entitle the latter to his compensation in accordance with the stipulations of the contract which the law specifically empowers and authorizes the parties to make."

THE CONTRACT IN THIS CASE WAS NEITHER GOVERNMENTAL OR LEGISLATIVE, BUT PROPRIETARY.

If by legislative power the plaintiff in error means the exercise of its governmental functions, we are in perfect accord with it on that subject, but we do not concur in the view that the execution of a contract for the purpose of furnishing fire apparatus for the fire department of a city is the exercise of a governmental power, but on the contrary is proprietary and for the purpose of the private advantage of all inhabitants of the municipality. An examination of the authorities cited in the Brief of Plaintiff in error on this subject will disclose the fact that in those cases where the contract was held invalid, the council failed to take the jurisdictional steps pro-

vided for in the charter. These jurisdictional matters are held to be mandatory and consequently in those cases where the council failed to follow the mandate of the charter the contracts could not be enforced.

A distinction is made between the exercise by a city of its powers; one of which is governmental and the other proprietary. The doctrine is well stated in the case of First National Bank vs. Emmetsburg, 157 Ia. 555, same case reported in L. R. A. 1915— At page 982 as follows:

"It seems to be correctly held generally that a city has two classes of powers, which have been stated as follows: "A city has two classes of powers, the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other, proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class, it is governed by the rule here invoked. In their exercise it is ruling its people, and is bound to transmit its powers of government to its successive sets of officers, unimpaired. But in the exercise of the powers of the latter class, it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it

in the same way, and in their exercise it is to be governed by the same rules, that govern a private individual or corporation." Illinois Trust & Sav. Bank vs. Arkansas City, 34 L. R. A. 518, 22 CCA 171, 40 U. S. App. 257, 76 Fed. 271, Southern Bell Telephone & Teleg. Co. vs. Mobile (C. C.) 162 Fed. 523; Winona vs. Botzet, 23 L. R. A. (N. S.) 204, 94 C. C. A. 563, 169 Fed. 322, 21 Am. Neg. Rep. 445.

The dual character of municipal corporations has already been distinctly recognized by this court, and we have in effect at least directly adopted the rule stated in the quotation from the Illinois Sav. Bank case. State ex rel. White vs. Barker, 116 Iowa, 96, 57 L. R. A. 244, 94 Am. St. Rep. 222, 89 N. W. 204, and cases there cited. But the last cited case does not stand alone among our decisions as a recognition of the rule."

The same doctrine is recognized in the Oregon case above cited and approved by Wolverton, District Judge, in his opinion filed herein. In that case upon petition for rehearing, Judge Strahan, in denying the petition, used the following language: "On the second point presented by the petition I think that the construction placed upon section 128 must be adhered to. Any other would render it exceedingly difficult and inconvenient to conduct the affairs of the city. The Common Council would be compelled to devote more of its time to the consid-

eration and passage of a great many useless ordinances of no practical utility on subjects where the business is now usually conducted under the direct supervision of the council or a committee thereof." In the case at bar, the City Council and the Fire and Water Committee were not enacting any laws for governmental purposes, but on the contrary, the contract was one of proprietary interest, and under the authority above cited and the contract made by a committee having the matter in charge within the general scope of the powers of the city government is held binding and valid against the city.

THE CITY IS ESTOPPED TO QUESTION THE VALIDITY OF THE CONTRACT.

The defendant in error also contends in this action that the city is estopped from questioning the validity of the contract and the acts of its committee under its direction and authority. In respect to the actions concerning which a city may be estopped there are also two classes of cases referred to by the authorities under the question of ultra vires.

Where the contract is of such a nature as comes within the purposes of the creation of the corporation and is expressly provided for in the charter, the corporation is bound by the same rules as govern private corporation. We cannot sanction the doctrine laid down in plaintiff's brief that under these circumstances this is not a question of "justice and good conscience," especially since the contract

does not violate any question of public policy and there is no prohibition against it, but maintain that the municipality is bound by the same rules as other corporations and should not be allowed to induce a party to expend money and perform his part of the contract and escape its liability. And in this respect, we prefer to agree with the opinion filed by Wolverton, District Judge herein, that "justice and good conscience" have material bearing on the matter.

In the case of Bell vs. Kirkland, 102 Minn. 213, reported in 120 Am. St. Rep. 621, the court elaborately reviews the question of ultra vires and the distinction between acts of a municipality which are beyond its power and those informally done but within its power, and we quote from this case as follows in 120 Am. St. Rep. pages 630-631.

"There is good authority to the effect that where the act of a corporation is done with power to do it, but without the formality prescribed for the execution of the power persons dealing with the company are not bound to do more than to ascertain that the power to do the proposed act exists: 5 Thompson on Corporations, 5978; 2 Morawetz on Private Corporations, Secs. 678-686. Allen J., in Moore vs Mayor, 73 N. Y. 238, 21 Am. Rep. 134, said: "Persons dealing with corporations in respect to a matter within the general scope of the powers of the city government need not go behind the doings of the common council, apparently regular, to inquire

after preliminary or extrinsic irregularities . . . It is indispensable to any government, state or municipal, that full faith and credit be given to the acts of the governing body, and that individuals having occasion to deal with agents of the government should be permitted to regard the acts of the government valid in the absence of any apparent defect, either in the power or the manner of its exercise. If the act is not within the general powers of the municipality or its governing body, the case would be different, for everyone dealing with the agents of the municipality is bound to know the limits of that power. It is not allowable, however, for a municipal corporation to perpetrate a fraud upon those contracting with it upon the faith of its laws and ordinances, apparently valid and represented as such, by repudiating them upon the allegation of some technical and formal irregularity in their adoption, an omission of some collateral act, some formality prescribed by statute, not of the substance of the power or jurisdictional in its character." That leading case and this doctrine approved by this court in Bradley vs. Village of West Duluth, 45 Minn. 4, 47, N. W. 166. And see Brownell vs Town of Greenwich, 144 N. Y. 518, 22 N. E. 24, L. R. A. 685; Ohio and N. R. R. Co. vs. McCarthy, 96 U. S. 285, 24 L. Ed. 613, Miners D. Co. vs. Zellerbach, 37 Cal. 543. 99 Am. Dec. 300; Green's Brice's Ultra Vires, 37 and note, A. P. 506; 5 Thompson on Corporations, Sec. 5967."

In this case there can be no question as to the fact that not only had the city council full authority in its charter to provide for and maintain a fire department, but to appoint a committee in charge thereof, but that such a department was a necessary and proper one for the municipality to carry on and comes within the full scope of its purposes. And in the leading case of Hitchcock vs. Galveston, 96 U. S., page 341, the opinion was delivered by Mr. Justice Strong.

In that case, the city having the power to make contracts for the improvement of sidewalks ordered the contract to be entered into on behalf of the city by the Mayor and the Chairman of the Committee on Streets and Alleys, and it was contended that this contract was not valid and binding on the city, and in answer to this contention, Judge Strong says: "And if the City Council had lawful authority to construct the sidewalks, involved in it was the right of the Mayor and the Chairman of the Committee on Streets and Alleys to make a contract on behalf of the city for doing the work. We spend no time in vindicating this proposition." In the same case on the doctrine of estoppel Judge Strong approves the rule laid down in State Bd. of Agricul. vs. Citizens' St. R. Co. 47, Ind. 407 in an action against a municipal corporation as follows: "Although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter or of any statute prohibiting it,

and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money and perform his part thereof, the corporation is liable on the contract."

In the case at bar as to the estoppel, it will be remembered that the city not only authorized the committee to enter into the contract, but called attention to the fact that it had money on hand from the levy of the prior year to pay for this engine, it not only stood by and allowed the plaintiff to have the engine manufactured in its factory in New York, but when it reached Astoria had it tested and found it answered all the requirements of the contract and specifications, so that on this branch of the case, both as to the power of the committee to enter into the contract and what was done under it we again call attention to the language of Wolverton, District Judge, in the opinion of the demurrer filed herein as follows:

"In the present case, the Fire Department was created by ordinance and the common council was proceeding in pursuance of its special authority to create a fire department and to provide engines and other apparatus therefor wherein it authorized the execution by the committee of the contract in question, and I am impressed in the light of the case of Beers vs. Dalles City, supra, that the contract is legal and binding upon the city and so hold.

In the complaint, it appears that in reliance upon the contract the plaintiff constructed the apparatus in New York and shipped it to Astoria, where it was duly tested by the Committee and found to be up to the requirements of the contract, so that in justice and good conscience the city ought to pay the stipulated purchase price."

If therefore, the contract is "legal and binding" and "the city in justice and good conscience ought to pay the stipulated purchase price," the judgment of the lower court should be sustained.

Respectfully submitted,

FULTON & BOWERMAN,
BERNSTEIN & COHEN,
Attorneys for Defendant in Error.

No. 2588

United States

Circuit Court of Appeals

For the Ninth Circuit.

M. A. MILLER, Collector of Internal Revenue of the United States for the District of Oregon, and DAVID M. DUNNE,

Plaintiffs in Error,

vs.

SNAKE RIVER VALLEY RAILROAD COMPANY, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Oregon.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

M. A. MILLER, Collector of Internal Revenue of the United States for the District of Oregon, and DAVID M. DUNNE,

Plaintiffs in Error,

vs.

SNAKE RIVER VALLEY RAILROAD COMPANY, a Corporation,

Defendant in Error.

Names and Addresses of the Attorneys of Record.

CLARENCE L. REAMES, United States Attorney, and EVERETT A. JOHNSON, Assistant United States Attorney, Portland, Oregon, for the Plaintiffs in Error.

W. W. COTTON, A. C. SPENCER, and W. A. ROBBINS, Wells Fargo Building, Portland, Oregon, for the Defendant in Error.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6338.

SNAKE RIVER VALLEY RAILROAD COMPANY, a Corporation,

Plaintiff,

vs.

M. A. MILLER, Collector of Internal Revenue of the United States for the District of Oregon, and DAVID M. DUNNE,

Defendants.

Citation on Writ of Error.

United States of America,
Ninth Judicial Circuit,—ss.

To Snake River Valley Railroad Company, a Corporation, Plaintiff Above Named and Defendant in Error, and to Attorneys for said Railroad Company, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the District Court of the United States, for the district of Oregon, wherein the above-named defendants M. A. Miller, Collector of Internal Revenue of the United States, for the District of Oregon, and David M. Dunne, are plaintiffs in error, and the Snake River Valley Railroad Company, a corporation, is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf. [1*]

WITNESS, the Honorable R. S. BEAN, District Judge of the United States at Portland, within said circuit, this 15th day of March, 1915.

R. S. BEAN,
United States District Judge. [2]

United States of America,
District of Oregon,—ss.

Service of the foregoing citation on writ of error,

*Page-number appearing at foot of page of original certified Record.

by receipt of copy thereof duly certified to by E. A. Johnson, Attorney for the above-entitled defendants, together with similar copy of petition for writ of error, order allowing writ of error, assignment of errors, and writ of error, is hereby admitted at Portland, Oregon, this 15th day of March, 1915.

W. A. ROBBINS,

Of Counsel for Snake River Valley Railroad Company, Defendant in Error. [3]

[Endorsed]: No. 6338. In the District Court of the United States for the District of Oregon. Snake River Valley Railroad Company, a Corporation, Plaintiff, vs. M. A. Miller, Collector of Internal Revenue of the United States, for the District of Oregon, and David M. Dunne, Defendants. Citation on Writ of Error. Filed March 15, 1915. G. H. Marsh, Clerk. [4]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6338.

SNAKE RIVER VALLEY RAILROAD COMPANY, a Corporation,

Plaintiff,

vs.

M. A. MILLER, Collector of Internal Revenue of the United States for the District of Oregon, and DAVID M. DUNNE,

Defendants.

Writ of Error.

United States of America,
Ninth Judicial District,—ss.

The President of the United States, to the Honorable Judges of the District Court of the United States, for the District of Oregon, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the above-entitled District Court, and before you, or some of you, between the Snake River Valley Railroad Company, a corporation, plaintiff, and M. A. Miller, Collector of Internal Revenue of the United States, for the District of Oregon, and David M. Dunne, defendants, a manifest error has happened to the great damage of the said defendants as by their petition and assignment of error hereinbefore filed, we being willing that error, if any has been, should be duly corrected and full and speedy [5] justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then and under your seal distinctly and openly, you send the record and proceedings, aforesaid, with the things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in said Circuit on the 1st day of April, 1915, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings, aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done

therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 15th day of March, A. D. 1915.

[Seal]. Attest: G. H. MARSH,
Clerk of the District Court of the United States for the District of Oregon. **[6]**

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Snake River Valley Railroad Company, a Corporation, Plaintiff, vs. M. A. Miller, Collector of Internal Revenue of the United States, for the District of Oregon, and David M. Dunne, Defendants. Writ of Error. Filed March 15, 1915. G. H. Marsh, Clerk United States District Court, District of Oregon. **[7]**

In the District Court of the United States for the District of Oregon.

March Term, 1914.

BE IT REMEMBERED, That on the 6th day of March, 1914, there was duly filed in the District Court of the United States for the District of Oregon, a Complaint, in words and figures as follows, to wit: **[8]**

In the District Court of the United States for the District of Oregon.

No. 6338.

SNAKE RIVER VALLEY RAILROAD COMPANY, a Corporation,

Plaintiff,

vs.

M. A. MILLER, Collector of Internal Revenue of the United States for the District of Oregon, and DAVID M. DUNNE,

Defendant.

Complaint.

Comes now the Snake River Valley Railroad Company, the plaintiff above-named, and for cause of action against the above-named defendants, alleges:

I.

That the plaintiff on and prior and subsequent to June 27, 1911, was a corporation duly organized and existing under the laws of the State of Oregon, and the owner of a line of railroad extending from Wallula, Washington, in a general northeasterly direction to the town of Grange City in said State.

II.

That the defendant, M. A. Miller, was on and subsequent to August 16, 1913, and is now the duly appointed and acting Collector of Internal Revenue of the United States for the District of Oregon; and that defendant, David M. Dunne, was prior to August 16, 1913, the duly appointed and acting Collector of Internal Revenue of the United States for the District of Oregon.

III.

This plaintiff herein on the 29th day of June, 1907, leased to The Oregon Railroad and Navigation Company its entire railroad and all property connected therewith, and same was turned [9] over to the Oregon Railroad and Navigation Company and since said date has been operated by The Oregon Railroad and Navigation Company and its successor in interest, the Oregon-Washington Railroad & Navigation Company; and the plaintiff has not since said date carried on any business in connection with the operation of said railroad and has not been engaged in doing or carrying on any business whatsoever, except the business of owning the property, maintaining the investment, collecting the income and dividing it among its stockholders.

IV.

That notwithstanding the fact that the plaintiff has not since June 29, 1907, been engaged in or doing business in any manner whatsoever, except as above set forth, the defendant, David M. Dunne, as Collector of Internal Revenue of the United States for the District of Oregon, wrongfully and illegally exacted and collected from the plaintiff, under color of the provisions of Section 38 of an Act of Congress of the United States, approved August 5, 1909, entitled, "An Act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes," and demanded and required the plaintiff to involuntarily and under duress and compulsion pay to him on the 27th day of June, 1911, as Collector of Internal Revenue of the United

States for the District of Oregon, the sum of $870.70, as special excise taxes for the year ending June 30, 1911. That at said time and place plaintiff served written notices upon defendant, David M. Dunne, that said payment was made under duress and compulsion and under protest, solely for the purpose of avoiding the imposition of the penalties in said act provided, and the restraint of its goods, chattels and effects, reserving all its rights to recover said amount so illegally and erroneously assessed and collected, and that the assessment of said tax was illegal and void as against the plaintiff.

V.

That thereafter and on the 2d day of May, 1913, the plaintiff **[10]** herein presented and delivered to David M. Dunne, as Collector of Internal Revenue of the United States for the District of Oregon, for transmission to the Commissioner of Internal Revenue of the United States at Washington, D. C., its appeal to said commissioner in the form and manner required by law, and the regulations of the secretary of the treasury of the United States, established in pursuance thereof. That thereafter and on or about the 26th day of June, 1913, said Commissioner of Internal Revenue and defendant, David M. Dunne, as collector, notified this plaintiff that it would be necessary for the claimant to furnish additional information in connection with said application for refund; that thereafter the plaintiff complied with said request and furnished said additional information to David M. Dunne, as collector, and to the Commissioner of Internal Revenue; and thereafter and

on or about the 21st day of November, 1913, said Commissioner of Internal Revenue rejected and disallowed said appeal. And said defendant, M. A. Miller, as Collector of Internal Revenue, and defendant, David M. Dunne, as former Collector of Internal Revenue, to whom said money was paid, by reason of the disallowance and rejection of said appeal and application for refund by the Commissioner of Internal Revenue, refused and still refuse to refund to this plaintiff the whole or any part of said taxes so wrongfully and illegally exacted and collected from this plaintiff.

WHEREFORE, plaintiff demands judgment against the defendants for the sum of Eight Hundred Seventy and 70/100 (780.70) Dollars, together with interest thereon from June 27th, 1911, and for its costs and disbursements herein.

W. W. COTTON,
A. C. SPENCER,
W. A, ROBBINS,
Attorneys for Plaintiff. **[11]**

United States of America,
District of Oregon,
County of Multnomah,—ss.

J. P. O'Brien, being first duly sworn, on oath deposes and says: That he is vice-president of the Snake River Valley Railroad Company, the plaintiff herein; that he has read the foregoing complaint, knows the contents thereof, and the same is true as he verily believes.

J. P. O'BRIEN.

Subscribed and sworn to before me this 6th day of March, A. D. 1914.

[Seal] T. M. SCOTT,
Notary Public for Oregon.

Filed March 6, 1914. A. M. Cannon, Clerk. [12]

And afterwards, to wit, on the 5th day of June, 1914 there was duly filed in said court and cause an Answer, in words and figures as follows, to wit: [13]

Come now the above-named defendants and for their answer to the complaint of plaintiff hereinbefore filed, admit, deny and allege as follows:

I.

Answering paragraph one of plaintiff's complaint, defendants admit that on and prior and subsequent to June 27, 1911, plaintiff was a corporation duly organized and existing under the laws of the State of Oregon; and defendants admit that on and for some years prior to the date of December 23, 1910, said plaintiff corporation was the owner of the line of railroad in said paragraph one of said complaint described, but defendants deny each and every other allegation in said paragraph one contained.

II.

Answering paragraph two of plaintiff's complaint, defendants admit the allegations contained therein and all thereof. [14]

III.

Answering paragraph three of plaintiff's complaint defendants admit that on the date therein al-

leged, plaintiff leased to the Oregon Railroad and Navigation Company, upon the terms and conditions in said lease stated, its said entire railroad and all its property connected therewith and with the operation thereof, as is more fully set forth in said lease, a copy of which said lease from plaintiff to said the Oregon Railroad and Navigation Company, with related notices and agreement for the termination thereof, is hereto attached and marked Exhibit "A," and by reference thereto hereby made a part hereof; and defendants admit that said railroad and property in said lease described, was turned over to the Oregon Railroad and Navigation Company, and since said date and until the sale thereof, has been operated by the Oregon Railroad and Navigation Company and by its successor in interest, the Oregon-Washington Railroad & Navigation Company, under and according to the terms of said lease and not otherwise, and after said sale of said property, operated by said companies as owners; and defendants admit that since said date of June 29, 1907, and until said railroad and property was sold by plaintiff, plaintiff was carrying on the business of owning said property, maintaining its said investment therein, collecting the income therefrom and dividing it among its stockholders, but defendants deny each and every other allegation in said paragraph three contained.

IV.

Answering paragraph four of plaintiff's complaint, defendants admit that the defendant, David M. Dunne, as Collector of Internal Revenue of the

United States for the District of Oregon, exacted and collected from the plaintiff under color of the provisions of Section 38 of the Act of Congress of the United States approved August 5, 1909, entitled "An Act to provide revenue, equalize duties and encourage the industries of the [15] United States and for other purposes," and demanded and required the plaintiff to involuntarily pay to him on said 27th day of June, 1911, as Collector of Internal Revenue of the United States for the District of Oregon, the sum of $870.70 as special excise taxes for the year ending December 31, 1910; and defendants admit that at said time and place, plaintiff served written notice upon defendant David M. Dunne, that said payment was made under duress and compulsion and under protest, and for the purpose of avoiding the imposition of the penalties in said act provided, and the restraint of its goods, chattels and effects, reserving all its right to recover said amount so assessed and collected, but defendants deny that plaintiff has not since June 29, 1907, been engaged in or doing business in any manner whatsoever, except as in plaintiff's complaint thereinbefore set forth; and defendants further deny that the said tax so by said defendant Dunne assessed and collected from plaintiffs, was for the year ending June 30, 1911, or for any year other than the year beginning January 1, 1910, and ending December 31, 1910; and defendants further deny that the said tax so by the said defendant Dunne assessed and collected from plaintiff, was wrongfully or illegally or erroneously assessed or collected, and deny that the assessment of said tax

was illegal or void as against this plaintiff as is by plaintiff alleged in said paragraph four of said complaint.

V.

Answering paragraph five of plaintiff's complaint, defendants admit every allegation therein contained, and the whole thereof, except that portion of said paragraph five contained in line 4 of page 4 of said complaint, wherein the taxes therein mentioned are referred to and alleged to have been "wrongfully and illegally" exacted and collected from plaintiff, but defendants deny that the collection of said tax and taxes, and the taxes so assessed, is in any manner wrongful or illegal as alleged in said paragraph five, but was and is in all respects rightful and in accordance with law. [16]

VI.

Further answering the complaint of plaintiff, defendants allege that at all times subsequent to date of January 1, 1910, and to and including the 23d day of December, 1910, plaintiff corporation was the owner of the line of railroad described in plaintiff's complaint, together with the rolling stock and other equipment necessary to the ordinary operation thereof, and maintained the general offices of said corporation in the city of Portland, Oregon; that during all of said times and dates, plaintiff maintained its corporate existence by the holding of stockholder's meetings, and the election thereat, and appointment thereafter to its various offices, of corporate directors and officers; that during said time between dates of January 1, 1910 and December 23,

1910, the business of said corporation done and transacted by it and by its said officers and assistants, was that of owning the said property and maintaining its investment therein, and of collecting the income and rents therefrom, of the transfers of stock of said corporation, and the management of the finances and invested funds thereof; that in the course of the business of said corporation of maintaining its said investment, it became and was necessary and required of plaintiff, by and under the terms of said lease in paragraph three of this defendant's answer referred to, and said plaintiff corporation did at various times between said dates of January 1, 1910 and December 23, 1910, expend, for the improvement and betterment of plaintiff's said railroad, and the construction in connection therewith by plaintiff company, through the agency of its said lessee, of new warehouse, railroad tracks, and other railroad tracks connecting plaintiff company's line with the line and road of the North Coast Railroad Company, and for a stock and cattle passageway thereunder or thereover, sums aggregating as defendants believe and allege, the amount of Nine Hundred and fifty-five and 78/100 Dollars, and which said warehouse track and connecting track and cattle passageway were, between said dates of January 1, 1910 and December 23, 1910, so by plaintiff constructed. [17]

VII.

That between said last mentioned dates of January 1, 1910 and December 23, 1910, it was determined by the stockholders and officers and di-

rectors of plaintiff corporation that the property and railroad of plaintiff should be sold and the said lease theretofore made for same, cancelled; that on the said 23d day of December, 1910, and in the course of the business of plaintiff and as a part thereof, the said lease was by plaintiff cancelled and the said railroad, equipment and other property of said plaintiff corporation was on said date, by plaintiff sold and conveyed to the Oregon-Washington Railroad and Navigation Company and the proceeds of such sale, in the amount of Two Million, Two Hundred and Sixty-five Thousand ($2,265,000) Dollars, were on said date of December 23, 1910, received by plaintiff; that thereafter and prior to the first day of January, 1911, and in the course and as a part of plaintiff company's said business, plaintiff company, out of the proceeds of the said sale of its said property, paid its total bonded indebtedness, in the amount of One Million Five Hundred Thousand ($1,500,000) Dollars, and retired the bonds representing the same; and that thereafter and prior to the first day of January, 1911, and in the course and as a part of plaintiff company's said business, plaintiff company, out of the proceeds of the said sale of its said property, repaid to the Union Pacific Railroad Company, construction advances in the total amount, as defendants believe and allege, of Nine Thousand Four Hundred and Sixty and 22/100 ($9,460.22) Dollars; and that thereafter and prior to the first day of January, 1911, and in the course and as a part of plaintiff company's said business, plaintiff company, out of the proceeds of said sale of its said property, repaid to the Oregon

Railroad and Navigation Company, construction advances in the total amount, as defendants believe and allege, of One Thousand One Hundred and Forty-three and 85/100 ($1,143.85) Dollars; and that during the said year [18] ending December 31, 1910, plaintiff corporation did in the course of its said business, pay to the Secretary of State of the State of Oregon, its annual corporate license taxes required by law, and that in the maintenance of its said offices and in the transaction and doing as aforesaid of its said business, plaintiff corporation carried an account and accounts with one or more banks and banking houses in said city of Portland, making deposits of money from time to time therein and drawing its checks thereon and generally during said time doing all such acts and things as are usually and necessarily incident to the transaction of such business of plaintiff corporation as is hereinbefore alleged and set forth.

VIII.

That at all the times between said dates of January 1, 1910, and December 31, 1910, plaintiff corporation was one organized for profit and doing business as hereinbefore alleged in the States of Oregon, Washington and Idaho, and having a corporate stock represented by shares, and was not a labor, agricultural or horticultural organization or fraternal beneficiary society, order or association operating under the lodge system and providing for the payment of life, sick, accident, or other benefits to the members of such society, order or association, and to dependants of such members; nor a domestic building and

loan association, organized and operated exclusively for the benefit of its members; nor a corporation nor an association organized and operated exclusively for religious, charitable or educational purposes; that on or before the first day of March, 1911, as required by law, plaintiff corporation filed with defendant Dunne, its written return showing a net income during the said year ending December 31, 1910, of the sum of $92.070.00; that thereafter said defendant Dunne as Collector of Internal Revenue of the United States for the District of Oregon, assessed to plaintiff corporation, a tax of one per cent of all of said annual net income over and above the sum of Five Thousand Dollars [19] and in the amount as in plaintiff's complaint alleged, of $870.70, and that the said tax so by defendant Dunne assessed to and collected from plaintiff, was and is the tax mentioned in plaintiff's complaint and the tax for which recovery is therein sued; and that all of the acts and things done by the said plaintiff corporation in the said transaction of its said business as hereinbefore in this answer alleged, were done by plaintiff in accordance with the plaintiff's corporate rights and charter powers and privileges; and each and every thereof were within the corporate power granted by the State of Oregon to plaintiff in its said charter.

WHEREFORE, defendants having fully answered the complaint of plaintiff, pray that the said complaint may be dismissed, with the costs to defendants.

E. A. JOHNSON,

Assistant United States Attorney and Attorney for Defendants. [20]

United States of America,
District of Oregon,—ss.

I, M. A. Miller, being first duly sworn do on oath depose and say that I am one of the defendants in the within-entitled action; that I have read the foregoing answer and know the statements therein made and contained, and that the same are true as I verily believe.

Dated at Portland, Oregon, this 5th day of June, 1914.

M. A. MILLER.

Subscribed in my presence and sworn to before me by the above-named M. A. Miller, this 5th day of June, 1914.

[Seal] EVERETT A. JOHNSON,
Notary Public for Oregon. [21]

[Exhibit "A" to Answer—Lease, etc.]

THIS INDENTURE, made and entered into this 29th day of June, 1907, by and between THE SNAKE RIVER VALLEY RAILROAD COMPANY (hereinafter called the "lessor"), an Oregon corporation, of the first part, and THE OREGON RAILROAD & NAVIGATION COMPANY (hereinafter called the "lessee"), an Oregon corporation, of the second part,

WITNESSETH: That, in consideration of the mutual undertakings and agreements hereinafter contained, the parties hereto have undertaken, covenanted and agreed, and do hereby undertake, covenant and agree, to and with each other as follows, that is to say:

FIRST: The lessor hereby leases to the lessee, its successors and assigns, from the first day of July, 1907, for the term of five years then next ensuing, the railroad of the lessor, together with all equipment and appurtenances of every kind and nature whatsoever to the said railroad, belonging or appertaining.

SECOND: On the first day of December, 1907, and semi-annually thereafter on the first day of June, and the first day of December in each year during the term of this lease, the lessee will pay to the lessor as rent, for the half year ending on the last day of the month in which such rent is due and payable, the sum of $70,000, together with an additional sum, equal to interest payable during the half year next preceding such rent day at the rate of 6% per annum, upon all expenditures made after the date hereof for the purchase by or on account of the lessor, of locomotives, cars and other equipment for use upon or in connection with the railroad hereby leased, or for the construction or acquisition of extensions, branches, terminals or additions to or betterments of the demised premises. The aggregate amount or all such additional sums so paid, shall be equal to simple interest on all such expenditures from the first [22] day of the month next succeeding their payment to the end of the term of this lease. It is expressly understood and agreed that the amount of such rental shall be appropriated and applied by the lessor to the payment of its obligations and liabilities other than such as are assumed by the lessee pursuant to the provisions hereof:

THIRD: The lessee will operate the said railroad

and will pay the expenses of operation, maintenance, repairs and renewals thereof, and all incidental expenses connected therewith, and the sums payable for taxes and assessments upon the demised premises.

FOURTH: The lessor agrees that it will repay to the lessee, with interest at the rate of 6% per annum, all sums advanced by the lessee upon the request of the lessor, or necessarily expended by the lessee for additions or betterments to the demised premises, or for the purchase of locomotives, cars and other equipment for use thereon or in connection therewith, and the lessee shall be entitled to retain and pay to itself out of the rental payable to the lessor hereunder whatsoever shall be owing to it from the lessor, as aforesaid, including any interest which shall be justly due or owing to the lessee in respect thereof.

FIFTH: In case default shall be made by the lessee in the fulfillment of its obligations hereunder, and such default shall have continued for the period of ninety days after written notice of such default shall have been given by the lessor, its successors or assigns, to the lessee, its successors or assigns, then and in any such event the lessor, its successors and assigns, may thereupon and without demand or other formality, enter upon and take possession of all and singular the demised premises with their appurtenances, and it or they thereafter shall be entitled to hold, retain and enjoy the same as of its original estate therein and notwithstanding such entry, the lessee, its successors and assigns, shall be liable to the lessor its successors and assigns, [23] for any and all damages in anywise resulting from the non-fulfill-

ment of its agreement hereunder, or from any wrongful acts or omissions of the lessee, its successors or assigns, in respect to the demised premises or any part thereof.

SIXTH: This lease may at any time be terminated by sixty days' notice in writing by either party to the other; and it is further agreed between the parties hereto that if at any time it appears that by the operation of this agreement either party is being benefited at the expense of the other, then this agreement shall be revised and changed so that such will not be its operation, and if the parties hereto cannot agree upon the changes necessary to that end, then each party shall appoint one arbitrator and the two arbitrators so chosen shall choose a third arbitrator, and the award and decision in writing of such arbitrators, or a majority of them, shall be binding upon the parties hereto, and this agreement shall be revised and changed in accordance with such award and decision and as so revised and changed shall be duly executed in writing by the parties hereto.

IN WITNESS WHEREOF, each of the parties hereto has caused these presents to be signed by its president or a vice-president and its corporate seal to be hereunto affixed, attested by its secretary or an as-

sistant secretary, the day and year first above written.

THE SNAKE RIVER VALLEY RAILROAD COMPANY.

By WM. CROOKS,
Vice-president.

[Seal] Attest: W. R. LITZENBERG,
Asst. Secretary.

THE OREGON RAILWAY & NAVIGATION COMPANY.

By W. D. CORNITH,
Vice-president.

[Seal] Attest: JOS. HELLEN,
Asst. Secretary. [24]

State of Oregon,
County of Multnomah,—ss.

On this 10th day of August, A. D. 1907, before me, personally appeared Wm. Crooks and W. R. Litzenberg, to me known and known to me to be the president and assistant secretary respectively of The Snake River Valley Railroad Company one of the corporations that executed the within and foregoing instrument and severally acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned and on oath severally stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] C. G. SUTHERLAND,
Notary Public in and for Oregon. [25]

State of New York,
County of New York,—ss.

On this 29th day of August, A. D. 1907, before me, appeared W. D. Cornith and Joe Hellen, both to me personally known, who being severally duly sworn did say that he, the said W. D. Cornith is the vice-president, and that he, the said Jos. Hellen is the asst. secretary of The Oregon Railroad & Navigation Company, one of the corporations that executed the foregoing instrument and that the seal affixed to said instrument is the corporate seal of said corporation *and that the seal affixed to said instrument is the corporate seal of said corporation* and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors and said W. D. Cornith and Jos. Hellen severally acknowledged said instrument to be the free act and deed of said corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal this the day and year in this, my certificate written.

[Seal] L. ELWELL,
Notary Public New York County. [26]

THE SNAKE RIVER VALLEY RAILROAD COMPANY.

Portland, Oregon, Dec. 17, 1910.

To the Oregon Railroad and Navigation Company:

Notice is being served on you herewith of the termination of the lease existing between you and this company, dated the 29th day of June, 1907, in accord-

ance with the provisions of the lease.

This company respectfully request that you waive the requisite notice for the termination of said lease, under the provisions thereof, and that the said lease be cancelled by mutual agreement between you and this company, to take effect at 11:59 o'clock p. m. Pacific time, on December 23, 1910.

This company hereby notifies you that it is willing to agree to the termination of said lease at said time.

THE SNAKE RIVER VALLEY RAILROAD COMPANY.

(Signed) By L. F. STEEL,
Assistant Secretary. [27]

THE SNAKE RIVER VALLEY RAILROAD COMPANY.

Portland, Oregon, December 17, 1910.

To the Oregon Railroad and Navigation Company:

You are hereby notified that The Snake River Valley Railroad Company hereby elects to, and does, terminate that certain lease dated the 29th day of June, 1907, by and between The Snake River Valley Railroad Company, Lessor, and The Oregon Railroad and Navigation Company, Lessee, wherein and whereby the said The Snake River Valley Railroad Company did lease to said The Oregon Railroad and Navigation Company for the term of five years from the first day of July, 1907, the railroad of said The Snake River Valley Railroad Company, together with the equipment and appurtenances of every kind and nature whatsoever to said railroad belonging or appertaining, said termination of said lease to take effect sixty (60) days from the date hereof, to wit, on

February 15th, 1911, in accordance with the sixth paragraph of the said lease.

THE SNAKE RIVER VALLEY RAILROAD COMPANY.

[Seal] By L. F. STEEL,
Assistant Secretary. [28]

MEMORANDUM OF AGREEMENT made and entered into this 23d day of December, A. D. 1910, by and between The Snake River Valley Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Oregon, and The Oregon Railroad and Navigation Company, a like corporation;

WITNESSETH that, for and in consideration of the sum of One Dollar paid by the first party above named to the second party, receipt whereof is hereby acknowledged, the said parties hereto agree that that certain lease dated the *w*9th day of June, 1907, be, and the same hereby is, cancelled and terminated to take effect at 11:59 o'clock P. M. Pacific Time, on December 23d, 1910.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed by their proper officer thereunto duly authorized the day and year first above written.

THE SNAKE RIVER VALLEY RAILROAD COMPANY.

By J. P. O'BRIEN.
Vice-president.

[Seal] Attest: L. F. STEEL,
Secretary.

[Seal] Attest: W. W. COTTON,
Assistant Secty.

Service of the within answer by receipt of certified copy thereof, is hereby admitted at Portland, Oregon, this 5th day of June, 1914.

W. A. ROBBINS,
Of Attorneys for Plaintiff.

Filed June 5, 1914. A. M. Cannon, Clerk. [29]

And afterwards, to wit, on the 13th day of June, 1914, there was duly filed in said Court and Cause a Demurrer to Answer, in words and figures as follows, to wit: [30]

[Demurrer to Answer.]

Comes now The Snake River Valley Railroad Company, the plaintiff above named, and demurs to the further and separate answer and defense of the defendants herein, upon the ground and for the reason that said further and separate answer and defense does not state facts sufficient to constitute a defense against said plaintiff in this action.

W. W. COTTON,
A. C. SPENCER,
W. A. ROBBINS,
Attorneys for Plaintiff, The Snake River Valley Railroad Company.

United States of America,
District of Oregon,—ss.

I, W. A. Robbins, one of the attorneys for the plaintiff in the above-entitled action, hereby certify that I prepared the foregoing demurrer and that the same is, in my opinion and best judgment, well founded in law and is not filed for the purposes of delay.

Dated at Portland, Ore., this 13 day of June, 1914.

W. A. ROBBINS.

Service by copy admitted at Portland, 6/13, 1914.

E. A. JOHNSON,
Solicitor for Defendants.

Filed June 13, 1914. A. M. Cannon, Clerk. [31]

And afterwards, to wit, on Monday, the 3d day of August, 1914, the same being the 25th judicial day of the regular July term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit: [32]

[Order Sustaining Demurrer, etc.]

This cause was heard upon the demurrer of the plaintiff to the answer filed herein and was argued by Mr. W. A. Robbins, of counsel for the plaintiff, and by Mr. Everett A. Johnson, Assistant United States Attorney, of counsel for the defendants; on consideration whereof, IT IS ORDERED AND ADJUDGED that said demurrer be, and the same is hereby, sustained; and on motion of said defendants it is further ORDERED that they be, and are hereby, allowed ten days from this date, within which to further plead. [33]

And afterwards, to wit, on the 3d day of August, 1915, there was duly filed in said Court and Cause an Opinion, in words and figures as follows, to wit: [34]

[Opinion.]

MEMORANDUM BY BEAN, District Judge.

These four cases are brought against the Collector of Internal Revenue to recover sums of money paid by the respective plaintiffs under protest as corporation taxes, under the Act of Congress of August 5, 1909. The plaintiff in each case had leased its road to another company which was operating it during the taxing year in question, and therefore in my opinion was not doing business within the meaning of the Corporation Tax Act. I am unable to distinguish the cases from that of McCoach vs. Minehill Railroad Company, 228 U. S. 295, in which the Supreme Court held that a railroad company which has leased its railroad to another company operating it exclusively, and which maintains its corporate existence and collects and distributes to its stockholders the rentals from the lessee, and also dividends from investments is not doing business within the meaning of the Corporation Tax Act.

The demurrers to the answers will therefore be sustained.

Filed August 3, 1914. A. M. Cannon, Clerk. [35]

And afterwards, to wit, on the 12th day of January, 1915, there was duly filed in said court and cause the Election of Defendants to stand upon their answer, in words and figures as follows, to wit: [36]

[Election of Defendants to Stand upon Their Answer.]

Come now M. A. Miller, Collector of Internal Revenue of the United States for the District of Oregon, and David M. Dunne, the above named defendants, by E. A. Johnson, Assistant United States Attorney for Oregon, and attorney for defendants above named, and show unto the Court that they are unable to further amend their answer heretofore in the above entitled cause filed and by this Honorable Court on the 3d day of August, 1914, held insufficient upon demurrer of plaintiff, and by reason thereof hereby elect to stand upon their answer heretofore filed as aforesaid.

Dated at Portland, Oregon, this 11th day of January, 1915.

E. A. JOHNSON,
Attorney for Defendants.

United States of America,
District of Oregon,—ss.

Due and legal service of the within election of defendants to stand upon answer is hereby accepted this 11th day of January, 1915.

A. C. SPENCER,
Of Attorneys for Plaintiff.

Filed January 12, 1915. G. H. Marsh, Clerk. [37]

And afterwards, to wit, on the 12th day of January, 1915, there was duly filed in said court and cause a Motion for Judgment of the Pleadings, in words and figures as follows, to wit: [38]

[Motion for Judgment on the Pleadings.]

Comes now the plaintiff, the Snake River Valley Railroad Company, and moves the Court for a judgment on the pleadings in favor of the plaintiff herein, upon the grounds and for the reasons that the pleadings are insufficient to sustain a different judgment, notwithstanding any evidence *with* might be produced, and this Court has heretofore sustained plaintiff's demurrer to defendants' further and separate answer and defense, and said defendants have failed and declined to amend said further and separate defense or further plead, and the answer as it now stands admits and leaves undenied all of the material allegations of the complaint, but denies only the legal conclusions contained in said complaint, more particularly as follows, to wit:

I.

Paragraph I of the answer, which is an allegation that plaintiff is a corporation organized under the laws of the State of Oregon and is the owner of a line of railroad extending from Wallula, Washington, in a general northeasterly direction to the town of Grange City, in said State, is admitted.

II.

The answer admits Paragraph II of the complaint, which is an allegation that M. A. Miller is the present

Collector and David M. Dunne former Collector of Internal Revenue.

III.

The answer admits Paragraph III of the complaint, except that it denies plaintiff's legal conclusion that it, the plaintiff, has not, since June 29, 1907, carried on any business in connection with the operation of a railroad, and has not been engaged in doing or carrying on any business whatsoever.

IV.

The answer admits Paragraph IV of the complaint except that it again denies that plaintiff has not since June 29, 1907, [39] been engaged in doing business and denies that the taxing year ended June 30, 1911, and denies that said taxes were illegally and erroneously assessed and collected.

V.

The answer admits Paragraph V with the exception that it denies plaintiff's legal conclusion that said taxes were wrongfully and illegally collected from the plaintiff.

W. W. COTTON,
A. C. SPENCER,
W. A. ROBBINS,
Attorneys for Plaintiff.

United States of America,
District of Oregon,—ss.

I, W. A. Robbins, one of the attorneys for the plaintiff, hereby certify that the foregoing Motion is not interposed for the purpose of delay, and that in

my opinion same is meritorious and well founded in law.

W. A. ROBBINS,
One of the Attorneys for Plaintiff.

Service admitted at ——, 1/12, 1915.

E. A. JOHNSON,
Solicitor for Defts.

Filed January 12, 1915. G. H. Marsh, Clerk. [40]

And afterwards, to wit, on Monday, the 8th day of February, 1915, the same being the 85th judicial day of the regular November, 1914, term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit: [41]

In the District Court of the United States for the District of Oregon.

No. 6338.

SNAKE RIVER VALLEY RAILROAD COMPANY, a Corporation,

Plaintiff,

vs.

M. A. MILLER, Collector of Internal Revenue of the United States for the District of Oregon, and DAVID M. DUNNE,

Defendants.

Judgment Order.

February 8, 1915.

Now at this time this matter coming on regularly to be heard upon plaintiff's motion for a judgment

on the pleadings in favor of the plaintiff, and it appearing to the Court that the pleadings are insufficient to sustain a different judgment, notwithstanding any evidence which might be produced, and this Court has heretofore sustained plaintiff's demurrer to defendant's further and separate answer and defense, and said defendants have failed and declined to amend said further and separate defense or further plead, and the answer as it now stands admits and leaves undenied all of the material allegations of the complaint, but denies only the legal conclusions contained in said complaint, and it further appearing to the Court that said Motion should be granted, it is therefore.

CONSIDERED, ORDERED AND ADJUDGED that plaintiff's motion for a judgment on the pleadings is hereby granted and that plaintiff do have and recover of and from the defendants herein, and each of them, the sum of eight hundred seventy dollars and seventy cents ($870.70) together with interest thereon from June 27, 1911, and for plaintiff's costs and disbursements taxed and allowed at the sum of $20.85 dollars, and that execution issue therefor. [42]

And afterwards, to wit, on the 15th day of March, 1915, there was duly filed in said Court and cause a Petition for Writ of Error, in words and figures as follows, to wit: [43]

[Petition for Writ of Error.]

Comes now M. A. Miller, Collector of Internal Revenue of the United States, for the District of

Oregon, and David M. Dunne, defendants herein, and say that on or about the 8th day of February 1915, this Court entered judgment herein in favor of the plaintiff and against these defendants, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of these defendants, all of which will more in detail appear from the assignment of errors which defendants file with this petition.

WHEREFORE, these defendants pray that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals for said circuit.

E. A. JOHNSON,
Attorney for Defendants.

Filed March 15, 1915. G. H. Marsh, Clerk. [44]

And afterwards, to wit, on the 15th day of March, 1915, there was duly filed in said court and cause an Assignment of Errors, in words and figures as follows, to wit: [45]

[Assignment of Errors.]

The defendants above named, in connection with their petition for a writ of error herewith filed, make the following assignment of errors which they aver occurred in the proceedings and judgment had and rendered in said cause, to wit:

I.

That the Court erred in sustaining the demurrer of plaintiff to the answer of defendants filed in the above-entitled cause.

II.

That the Court erred in not overruling the demurrer of the plaintiff to the answer filed by the defendants in the above-entitled cause.

III.

That the Court erred in holding that the answer of defendants filed to the complaint of plaintiff in the above-entitled cause failed to plead a sufficient "doing of business" by plaintiff corporation within the year beginning January 1, 1910, and ending December 31, 1910, [46] to bring plaintiff company within the purview of the provisions of section 38 of act of Congress approved August 5, 1909, and to warrant the collection of the tax upon the net income of plaintiff corporation for that year as in said act of Congress provided.

IV.

That the Court erred in entering judgment for plaintiff and against defendant for the recovery of the moneys prayed for in the complaint of plaintiff.

V.

That the Court erred in entering judgment for plaintiff and against defendants for costs in the above-entitled action.

WHEREFORE, defendants pray that the said judgment be reversed.

E. A. JOHNSON,
Attorney for Defendants.

Filed March 15, 1915. G. H. Marsh, Clerk. [47]

And afterwards, to wit, on Monday, the 15th day of March, 1915, the same being the 13th judicial day of the Regular March term of said Court —Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit: [48]

[Order Allowing Writ of Error.]

On this 15th day of March, 1915, the above-named defendants appearing by E. A. Johnson, their attorney, and filing herein and presenting to the Court their petition praying for the allowance of a writ of error and assignment of errors intended to be urged by them and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

Now, on consideration thereof, the Court does allow the writ of error as prayed in the petition of defendants, without bond of defendants, it appearing that the above-entitled cause is one in which the United States, and not the record defendants, is the real party in interest in said cause, and this appeal being taken by direction of the Department of Justice of the United States of America.

R. S. BEAN,
Judge of the District Court.

Filed March 15, 1915. G. H. Marsh, Clerk. [49]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing writ of error, and in obedience thereto, do hereby certify that the foregoing pages numbered from 8 to 49, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case in which the Snake River Valley Railroad Company, a corporation, is plaintiff and defendant in error and M. A. Miller, Collector of Internal Revenue of the United States for the District of Oregon, and David M. Dunne are defendants and plaintiffs in error, as the same appear of record and on file at my office and in my custody, and I herewith return the said transcript of record into the United States Circuit Court of Appeals with the original writ of error and citation in said cause;

And I further certify that the cost of the foregoing transcript is Nine and 20/100 Dollars, and that the same has been charged against the United States in my account for fees.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Portland in said District this 25th day of March, A. D. 1915.

[Seal] G. H. MARSH,
Clerk. [50]

[Endorsed]: No. 2588. United States Circuit Court of Appeals for the Ninth Circuit. M. A. Miller, Collector of Internal Revenue of the United States for the District of Oregon and David M. Dunne, Plaintiffs in Error, vs. Snake River Valley Railroad Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Oregon.

Filed March 29, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2588

In the

United States Circuit Court of Appeals

For the Ninth Circuit

M. A. MILLER, Collector of Internal Revenue for the District of Oregon, and DAVID M. DUNNE,

Plaintiffs in Error,

vs.

SNAKE RIVER VALLEY RAILROAD COMPANY, a Corporation,

Defendant in Error.

Brief of Plaintiffs in Error

Upon Writ of Error to the District Court of the United States for the District of Oregon.

CLARENCE L. REAMES, United States Attorney for Oregon, and E. A. JOHNSON, Assistant United States Attorney, both of Portland, Oregon, Attorneys for Plaintiffs in Error.

W. W. COTTON, ARTHUR C. SPENCER and W. A. ROBBINS, all of Portland, Oregon, Attorneys for Defendant in Error.

No. 2588

In the

United States Circuit Court of Appeals

For the Ninth Circuit

M. A. MILLER, Collector of Internal Revenue for the District of Oregon, and DAVID M. DUNNE,

Plaintiffs in Error,

vs.

SNAKE RIVER VALLEY RAILROAD COMPANY, a Corporation,

Defendant in Error.

Brief of Plaintiffs in Error

Upon Writ of Error to the District Court of the United States for the District of Oregon.

STATEMENT OF FACTS.

This action was brought by the Snake River Valley Railroad Company, defendant in error, against the present and ex-Collectors of Internal Revenue for the District of Oregon, plaintiffs in error, in the District Court for the District of Ore-

gon, for the recovery of $870.70, corporate income tax assessed and paid by the Railroad Company to the United States under the provisions of Section 38 of the Act of August 5, 1909, generally known as the Corporate Income Tax Act. The taxing year for which this tax was paid is that of January 1, 1910, to December 31, 1910, inclusive.

The answer filed on behalf of plaintiffs in error was, upon demurrer, held insufficient by the District Court, with the usual time accorded under the rules to amend. Amendment, which would so strengthen the answer as to meet the objections of the court, was impossible. A formal election of the Collectors to stand upon their first answer was, therefore, filed; whereupon the Railroad Company moved for judgment upon the pleadings. This writ of error issued upon judgment so rendered.

From the pleadings filed in the cause, it appears that the Snake River Company was, during the taxing year in question, a corporation organized and existing under the laws of the State of Oregon, and the owner of a line of railroad extending from Wallula, Washington, to Grange City, Washington, with the necessary equipment for the operation thereof, and that prior to the taxing year in question and during the year of 1907, this line of railroad, and equipment and connected property, was leased for a short term to the Oregon Railroad and Navigation Company. The lease to this lessee company is made a part of the pleadings and record. By the terms

thereof, the lessee agreed to pay to the lessor, as rental for the railroad and other property leased, the sum of $70,000 per annum, together with such additional sum as would amount to six per cent interest upon all expenditures made by the lessor, after execution of the lease, on account of additions or improvements to road or equipment. During nearly all of the year of 1910, the lessee was in possession and operation of the leased property under the terms of this lease.

Early in 1911, the Snake River Company made its report to the then Collector of Internal Revenue, showing a net income during the taxing year of 1910 of the sum of $92,070. The source of income over and above the agreed annual rental of $70,000 is not disclosed. From this amount the Collector deducted the statutory exemption of $5,000 and assessed against the Snake River Company a tax of one per cent of the balance. It is admitted that this tax was paid by the defendant in error under protest, and that before the institution of this action to recover the tax so assessed and paid, defendant in error complied with the statutory requirements of application to the Commissioner of Internal Revenue for the refund of the tax collected. It is contended on behalf of plaintiffs in error that the imposition of the tax in question, and the collection thereof, was justified by reason of the fact that during the tax year in question the Snake River Company engaged in a sufficient doing of business in

its corporate capacity to bring it within the purview of the corporate income tax act mentioned.

It is alleged in the answer in this case, and by the demurrer admitted, that during the greater portion of the tax year mentioned, defendant in error was the owner of the line of railroad in its complaint described, with rolling stock and equipment necessary to the operation thereof; that during the year in question this company maintained general offices in the City of Portland, Oregon, and during that time maintained its corporate existence by the holding of stockholders' meetings, and the election thereat and appointment thereafter, to its various offices, of corporate directors and officers, who, on behalf of the corporation, were engaged in collecting the income and rents accruing by virtue of the lease of its property and otherwise; in the making of transfers of stock of the corporation; and in the management of the finances and invested funds thereof; and that during the taxing year mentioned, in addition to the usual and routine business of the Snake River Company, and through the agency of its lessee, and in accordance with the terms of its lease, it engaged in the construction of certain new warehouse railroad tracks, and of other railroad tracks connecting the line of railroad of the Snake River Railroad Company with the line and road of the North Coast Railroad Company; that it also constructed in the manner aforesaid a stock and cattle passageway thereunder or

thereover; that, before the expiration of the taxing year, it was determined by the stockholders and officers and directors of the Snake River Company that the lease theretofore made of its property should be canceled, and the property sold; that during the taxing year in question this lease was canceled (the lease itself providing for cancellation by either party thereto upon thirty days' notice to the other, but in this case cancellation being reached in less time by written agreement); that immediately after the cancellation of the lease, and on date of December 23, 1910, and during the tax year, the entire railroad, plant and equipment of defendant in error was sold; that on the same day, the proceeds of such sale, in the amount of over two million dollars, were received by the Snake River Company; that prior to the closing of the taxing year, the Snake River Company, out of the proceeds of such sale of its property, paid its total bonded indebtedness in the amount of a million and a half dollars, and retired the bonds representing the same; that prior to the close of the taxing year, and out of the proceeds of the sale of its said property, the defendant in error company repaid to other railroad companies considerable sums of money theretofore advanced to defendant in error by these other companies on account of construction work by defendant in error undertaken; and that, with other business done and transacted by defendant in error company during the taxing year in question, was the payment of state annual cor-

porate license taxes; the maintenance of offices; the carrying of accounts in bank; and depositing therein and withdrawing therefrom from time to time of sums of money; and generally all such acts as are usual and necessarily incident to such transaction of the business as is pleaded in this answer. The answer further alleges all of the business of defendant in error so transacted within the tax year to have been done within the corporate rights and charter powers and privileges of this company.

These acts of defendant in error were held by the court an insufficient doing of business to bring the defendant in error within the purview of the tax law mentioned. No question is raised of the correctness of the amount of tax imposed and collected. The only question presented is, whether or not the answer alleges a sufficient doing of business by defendant in error, in its corporate capacity, and during the taxing year of 1910, to warrant the imposition of any tax under the provisions of the Act of August 5, 1909.

POINTS OF LAW AND AUTHORITIES.

I.

The amount of business done is immaterial. The doing of any business with the advantages which inhere in corporate organization brings the corporation within the terms of the Act of August 5, 1909. The Snake River Company was "engaged

in business'' and was therefore subject to the Federal Corporation Tax.

Flint vs. Stone Tracy Company, 220 U. S. 107.

McCoach vs. Minehill Railway Company, 228 U. S. 295, 310.

II.

The so-called lease made by defendant in error company to its lessee is in effect a contract of agency only, and does not include the franchise to operate the line of railway demised. Under the terms of this contract, or agreement, the lessee company must be held to have operated as the agent of the owner, in which event the owner company is liable for the corporate tax assessed and collected.

McCoach, Collector, vs. Minehill Railway Company, 228 U. S. 295, 304.

ARGUMENT.

I.

It is not to be expected that the appellate courts would have decided a case in which the facts were so identical with those here involved as to be decisive of the case at bar, although the question of what constitutes being "engaged in business" has been before the Federal appellate courts in a number of cases. Probably the leading case upon that question is that of McCoach, Collector, vs. Minehill Railway Company, decided by the Supreme Court

April 7, 1913, and reported in 228 U. S. at pages 295-312. The Minehill Railway Company case came to the Supreme Court some time after the case of Flint vs. Stone Tracy Company (220 U. S. 107), and the cases therein joined for trial, including what are commonly known as the Real Estate Cases; and also subsequent to the case of Zonne vs. Minneapolis Syndicate (220 U. S. 187). The decision of the United States Supreme Court in the case of Flint vs. Stone Tracy Company is given almost entirely to the determination of the constitutionality of the corporate income tax law and sheds but little light upon the question of what is to be deemed a sufficient doing of business, within the meaning of the income tax law, to bring a corporation within that act. Such part of the opinion of the court as was given to this question in the decision of this case is found at 220 U. S. 169-170 and 171. At page 171, the court, speaking through Mr. Justice Day, say:

> "What we have said as to the character of the corporation tax as an excise disposes of the contention that it is direct, and therefore requiring apportionment by the Constitution. It remains to consider whether these corporations are engaged in business. 'Business' is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict., 158, citing People vs. Commissioners of Taxes, 23 N. Y. 242, 244. 'That which occupies the time, attention and labor of men for the purpose of a livelihood or profit.' Bouvier's Law Dictionary, Vol. I, p. 273.

"We think it is clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of this statute, and in the capacity necessary to make such organizations subject to the law.

"Of the Motor Taximeter Cab Company Case, No. 432, the company owns and leases taxicabs, and collects rents therefrom. We think it is also doing business within the meaning of the statute."

Flint vs. Stone Tracy Company, 220 U. S. 107-171.

The opinion of Mr. Justice Day, of the Supreme Court, in the case of Zonne vs. Minneapolis Syndicate, which case was decided concurrently with that of Flint vs. Stone Tracy Company, *supra*, follows the report of the Minehill Railway Company case and is found at 220 U. S. 187-191. In the latter case the court held that the Minneapolis Syndicate was not so engaged in business as to be subject to tax. It is not believed that the Zonne case is here in point, for the reason that in that case a long term lease, amounting practically to a sale of the property, had been negotiated, and the holding corporation against which the tax was laid had so amended its articles of incorporation and charter as to preclude it from any business other than a mere holding of the investment and a distribution

of the income therefrom and of the proceeds of the property held in event of sale.

Following, as it did, the Stone Tracy case, and the Zonne case, the one holding that the corporations were engaged in business and the other that the corporation was not, the Minehill Railway Company case proved a hard one, and was decided by a divided court, with a vigorous dissenting opinion by Mr. Justice Day, who had theretofore written the opinion of the court in both the Stone Tracy and Zonne cases, and in whose dissenting opinion Mr. Justice Hughes and Mr. Justice Lamar joined. By reason of the conversance of Mr. Justice Day with the questions involved, naturally consequent to his labors in connection with the two former opinions of the Supreme Court written by him, it is submitted that his dissenting opinion is worthy of note, and while not claimed as authority, may furnish a line of reasoning helpful in the present case. It is apparently determined that the amount of business done by the corporation taxed is utterly immaterial, provided the business is done in a corporate capacity by the corporation, and within the terms of the act. In this connection Mr. Justice day, in 228 U. S. at page 310 (dissenting opinion), says:

> "We are therefore brought to the direct question, Is a live corporation which, though it has leased its railroad property for a term of years, maintains and has agreed to maintain its corporate organization, collects and dis-

> tributes an annual rental of $252,612 keeps and maintains an office and an office force at large expense, deposits money upon interest and receives and distributes the earnings thereof, invests a large fund which, together with interest on deposits, yields over $24,000 a year, doing business within the meaning of the Corporation Tax Act? The amount of business done is utterly immaterial. The doing of any business with the advantages which inhere in corporate organization brings the corporation within the terms of the act. Such was the ruling in the Flint case after full consideration by this court of the terms and scope of the law."

It is contended by the defendant in error company that the case at bar is governed by the decision in the Minehill Railway Company case, *supra*, and such was the holding of the district court. The collectors, plaintiffs in error, contend that there are decided points of difference between the Minehill Railway Company case, and that here before the court. It will hardly be contended that the decision of the United States Supreme Court in the Minehill Railway Company case would have been the same, had there been shown any doing of business by that company in addition to that done by them as appears from the report in this case. In other words, it is submitted that the Supreme Court, in the Minehill Railway Company case, went to the extreme in holding the activities of that company without the purview of the corporate income tax act. If, therefore, we are able to distinguish that case from the one here before the court for decision, and to show a much greater corporate business activity on

the part of the Snake River Company than is shown in the record of the Minehill Railway Company case, it is believed that the judgment of the district court must be reversed.

The record of the Minehill Railway Company case discloses that that company, prior to the taxing year, leased its entire railroad, with side tracks, extensions, appurtenances, rolling stock and personal property, for a term of 999 years, at an annual rental equivalent to six per cent upon the capital stock of that company. This lease was to all intents and purposes and in effect a sale of the property of the lessor company. In the case at bar the lease from the Snake River Company to the lessee railroad is in striking contrast and requires particular notice. It runs for a term of but five years from July 1, 1907, and would have expired by limitation shortly after the close of the taxing year. It is apparently drawn with a view to constant association of the lessor and the lessee in the maintenance, improvement and additions to the railway system of the lessor. Paragraph II of the lease provides that the lessor shall be paid, in addition to the annual rental of $70,000 reserved,

> "an additional sum equal to interest payable during the half year next preceding such rent at the rate of six per cent per annum upon all expenditures made after the date hereof for the purchase by or on account of the lessor, of locomotives, cars and other equipment for use upon or in connection with the railroad hereby leased, or for the construction or acquisition of

extensions, branches, terminals or additions to or betterments of the demised premises."

The fourth paragraph of the lease likewise provides for the repayment by the Snake River Company to its lessee of sums advanced by the lessee at the request of the Snake River Company, or necessarily expended by the lessee for additions or betterments to the leased premises or for the purchase of equipment, together with six per cent interest thereon from the date of such expenditures. In the Minehill Railway Company case, the lessor company, during the taxing year, did nothing in the way of operation of its railroad line or additions to line or equipment. In the instant case it is alleged and admitted that the Snake River Company, by the agency of its lessee, constructed an additional line of railroad whereby the line of that company was connected with the line and road of the North Coast Railroad Company, and not only so constructed the connecting track of railroad mentioned, but in addition thereto laid and constructed certain warehouse railroad and side tracks and placed thereunder or thereover a stock and cattle passage way at a cost to the Snake River Company of almost $1,000.

In the Minehill Railway Company case, the 999 year lease entered into continued in force during the entire term of the taxing year. In the instant case the short term lease demising the property of the Snake River Company was canceled before the

expiration thereof; that cancellation being instituted by the officers of the Snake River Company in accordance with the terms of the lease, and subsequently effected by formal written agreement entered into between both parties to the lease. The lease was canceled December 23, 1910, within the year for which the tax here contested was laid. On the same day, a sale of the property theretofore demised was made by the Snake River Company, and formal deed of conveyance covering said property executed and delivered to the purchaser; in consideration of which conveyance the Snake River Company received the proceeds of said sale in the amount of $2,225,000. As alleged in the answer of the collector, and admitted by the demurrer, a considerable portion of this money so received from the sale of the property of defendant in error was disbursed by the Snake River Company during the taxing year in question, one and one-half millions of dollars going to the payment of the bonded indebtedness of that company, and the retirement of the bonds representing this indebtedness, and other payments being made to other railroad companies on account of funds advanced to the Snake River Company for construction purposes. In both the Minehill Railway Company case and the case here in question the railway companies each held stockholders' and directors' meetings, elected officers, made corporate reports, made collections of rentals and interest charges, maintained active accounts in

bank, managed the corporate finances, paid taxes, maintained offices, and transferred shares of stock.

The United States Supreme Court has held that the tax provided by the Act of 1909 is not measured by the amount of business transacted. A corporation engaged in business may do a great amount of business, and if no net income results, that corporation is not subject to payment of any tax under the provisions of this act. On the other hand, a corporation engaged in business may transact but one business deal during an entire year, and make a large net gain by reason thereof, one per cent of which, after deducting the $5,000 exemption provided by statute, must be paid to the Collector of Internal Revenue, under the provisions of this statute. Neither can the *right to tax* be governed by the amount of business transacted. Let us suppose that the Snake River Company was one organized and incorporated for profit under the corporation laws of Oregon, for the purpose of buying, owning and selling timber lands; and prior to the year 1910, had accumulated a large tract of such lands. Let us assume that the market for timber land during the year 1910 was stagnant; and that, in order to curtail maintenance expense, this company, as is the practice of owners of large timber tracts, had, in 1909, leased its timber lands to a stockman for grazing purposes. Now, let us assume that, on December 23, 1910, the Snake River Company procured a purchaser for its entire timber holdings, and consummated a sale thereof at a

large profit to the selling company. In this hypothetical case, does any reason prevail for exempting the Snake River Company from the provisions of the corporate income tax act? If not, why should the company be exempted, because, instead of owning and selling two and one quarter million dollars worth of timber lands, it owns and sells the same amount of railroad?

It should be likewise noted that every act of the Snake River Company corporation, during the taxing year in question and above mentioned, was done, not for the purpose of enabling the lessee to enjoy its rights under the lease, but for the direct benefit of the lessor company. The building of increased trackage presumably added to the value and efficiency of this company's line of road. The sale of its properties was presumably an advantageous one. The company was organized for profit, and all of its corporate activities during the taxing year of 1910 were within the corporate charter powers of this company, and within the ordinary scope of the business of a company organized for the purposes for which the Snake River Company was organized and incorporated. No court has in any reported decision gone so far as to hold that a corporation may be engaged in business to the extent of that transacted by defendant in error company and successfully plead such corporate inactivity as to remain without the purview of the corporate income tax act of 1909. It is respectfully submitted that if the facts in the Minehill Railway

Company case were such as to compel the opinion of but a bare majority of the United States Supreme Court that the company was not "engaged in business" within the meaning of this act, the facts in the case at bar, so much more conclusively showing a doing of corporate business within the taxing year than did those in the Minehill case, compel a decision against the defendants in error, and reversing the district court.

In the decision of the case of McCoach vs. Minehill Railway Company, *supra*, much consideration is given to the fact that this company maintained a so-called "contingent fund," the investment of which returned an item of income of approximately $24,000 during the taxing year. It should be noted in the instant case that the return of the Snake River Company to the Collector of Internal Revenue shows a net income, during the taxing year of 1910, of $92,070. The rental of the line of railroad of the Snake River Company, reserved in the lease, is of the amount of but $70,000 per annum, with provision for interest upon cost of improvements in equipment and line, which, during the year in question, could have amounted to not more than some hundreds of dollars. The source of that portion of the income of this company for 1910, over and above the $70,000 provided for by the lease of the Snake River Company's railroad line and equipment, and amounting to approximately $22,000, is not disclosed by the record, but it becomes apparent that the Snake River Company, during the taxing

year of 1910, had some source of income other than the lease of its line of railroad and equipment, so in this respect, it would appear that there is no difference between the case of the Minehill Railway Company and that here before the court. In fact, there appears to be no form of corporate activity found in the record of the Minehill Railway Company case which is not presented in the record of the case here for decision. In addition thereto, there is much in our case in the way of corporate business activity during the taxing year which is totally absent from the Minehall case mentioned. Counsel for the plaintiffs in error is convinced that, had the facts in the Minehill Railway Company case, when that case was before the Supreme Court, been those found in the case here presented, the United States Supreme Court would have reached a different decision, and that, upon a full consideration of the record in our case as the same discloses a doing of business by the Snake River Company during the taxing year of 1910, the decision of this court must, upon this issue alone, be for plaintiffs in error.

II.

In the majority opinion of the court in the Minehill Railway Company case, and at 228 U. S. 304, the court, in speaking of the lease demising the line of railroad and equipment and property of the Minehill Company, say:

> "If that lease had been made without authorization of law, it may be that for some purposes, and possibly for the present purpose, the lessee might be deemed in law the agent of the lessor; or at least the lessor held estopped to deny such agency. But the lease was made by the express authority of the state that created the Minehill Company, conferred upon it its franchise, and imposed upon it the correlative public duties. The effect of this legislation and of the lease made thereunder was to constitute the Reading Company the public agent for the operation of the railroad and to prevent the Minehill Company from carrying on business in respect of the maintenance and operation of the railroad so long as the lease shall continue. And it is the Reading Company, and not the Minehill Company, that is 'doing business' as a railroad company upon the lines covered by the lease and is taxable because of it."

The lease of the line of railroad and property of the Minehill Company, which was made to the Reading lines, as appears from page 297 of the report, included

> "All the rights, powers, franchises (other than the franchise of being a corporation), and privileges which may now, or at any time hereafter during the time hereby demised, be lawfully exercised or enjoyed in or about the use, management, maintenance, renewal, extension, alteration, or improvement of the demised premises or any of them."

It also appears from the report of the Minehill Railway Company case that this lease of the Minehill Company property and franchises was authorized under general acts of the Pennsylvania State

Legislature, and that a use, therefore, of the franchise granted to the Minehill Railway Company to operate its lines of railroad, was lawfully demised to its lessee.

Here, again, the Minehill Company case may be distinguished from that at bar. It will be noted from an examination of the lease demising the line and equipment of the Snake River Company to its lessee, that no demise is made therein of the franchise of this company. We refer, not to the *primary* franchise of the Snake River Company to be a corporation, but to the *secondary* franchise of that company to operate carriers and handle traffic over its railroad and right of way. The lease to this lessee simply covers the railroad property, e. g., tracks, cars, depots, engines, etc. In the absence of any demise or grant of the secondary franchise, the lessee could not lawfully operate trains and carry traffic over this right of way, except as the agent of the lessor. Now, it cannot be assumed that the lessee was operating unlawfully, and the only way it could operate lawfully, in the absence of a grant or demise in the lease of the secondary franchise, was as the agent of the Snake River Company, the lessor. That being the case, the holding of the Supreme Court in the Minehill case, as to the liability for the tax where the lessee operates as the agent of the lessor, becomes strictly applicable to our case. In the Minehill Railway Company case it is distinctly intimated that, if there was no

legal authority for the lessee to operate the railroad lines, it would then be considered a mere agent of the lessor in the operation thereof. This would be much more the case where the lease itself did not even purport or attempt to grant to the lessee the right to operate the railroad, as is true in our case; and in this case, it is submitted that this lease, in its present form, operated as nothing more nor less than a working agreement between the Snake River Company and its lessee, whereby the Snake River Company operated its line of railroad and equipment through the agency of the lessee. This view is strengthened by reason of the close association constantly required under the terms of this lease between the Snake River Company and the lessee, provided for in paragraphs II and IV of the lease.

Upon the whole record, it is respectfully submitted that the judgment of the district court must be reversed.

CLARENCE L. REAMES,
United States Attorney for Oregon,
EVERETT A. JOHNSON,
Assistant United States Attorney for Oregon,
Attorneys for Plaintiffs in Error.

No. 2588

In the

United States Circuit Court of Appeals

For the Ninth Circuit

M. A. MILLER, Collector of Internal Revenue for the District of Oregon, and DAVID M. DUNNE,
Plaintiffs in Error,

vs.

SNAKE RIVER VALLEY RAILROAD COMPANY, a corporation,
Defendant in error.

Brief of Defendant in Error

Upon Writ of Error to the District Court of the United States for the District of Oregon

CLARENCE L. REAMES, United States Attorney for Oregon, and E. A. Johnson, Assistant United States Attorney, both of Portland, Oregon, Attorneys for Plaintiffs in Error.

W. W. COTTON, ARTHUR C. SPENCER and W. A. ROBBINS, all of Portland, Oregon, Attorneys for Defendant in Error.

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STATEMENT OF FACTS

The statement made by plaintiffs in error seems to cover the case in a general way, and we do not deem it necessary to re-state the facts, other than to call the court's attention to the fact that the plaintiffs in error, set up in their answer, different activities which the

defendant in error was engaged in during the taxing year of 1910, and claim that such facts constituted, "a doing of business," within Section 38 of the Act of August 5, 1909, known as the Corporate Income Tax Act. Defendant in error demurred to the answer, and in sustaining the demurrer Mr. Justice Bean filed a memorandum opinion as follows:

"These four cases are brought against the Collector of Internal Revenue to recover sums of money paid by the respective plaintiffs under protest as corporation taxes, under the Act of Congress of August 5, 1909. The plaintiff in each case had leased its road to another company, which was operating it during the taxing year in question, and, therefore, in my opinion, was not doing business within the meaning of the Corporation Tax Act. I am unable to distinguish the cases from that of McCoach vs. Minehill Railroad Company, 228 U. S. 295, in which the Supreme Court held that a railroad company which has leased its railroad to another company, operating it exclusively, and which maintains its corporate existence and collects and distributes to its stockholders the rentals from the lessee, and also dividends from investments, is not doing business within the meaning of the Corporation Tax Act. The demurrers to the answers will therefore be sustained." (Page 28, Trans. Record.)

The plaintiffs in error, as is shown on page 29 of the Transcript of Record, elected to stand upon their answers, and thereupon defendant in error filed a motion for judgment on the pleadings, which motion was sustained. The only question presented, therefore, is whether

or not defendant in error was doing business during the taxing year of 1910, within the meaning of the Act of 1909.

POINTS AND AUTHORITIES

I.

The corporation tax is imposed upon the doing of corporate business and with respect to the carrying on thereof, and not upon the franchises, or property, of the corporation, irrespective of their use in business.

McCoach vs. Minehill Ry. Co., 228 U. S. 295-300.
Flint vs. Stone Tracey Co., 220 U. S. 107-145.
Zonne vs. Minneapolis Syndicate, 220 U. S. 187-191.
U. S. vs. Whitridge, 231 U. S. 144-147.
Von Baumback vs. Sargent Land Co., 219 Fed. 35-44.
U. S. vs. Nipissing Mines Co., 206 Fed. 431-433.
Anderson vs. Morris, Etc. Ry., 216 Fed. 83-89.
Wilkes-Barre Traction Co. vs. Davis, 214 Fed. 511-512.
New York Central Ry. Co. vs. Gill, 219 Fed. 184-185.
Public Service Railway vs. Herold, 219 Fed. 301-305.
Emery Bird, Etc. Co. vs. U. S., 198 Fed. 242-250. Affirmed by U. S. Sup. Ct. April 5, 1915.

II.

The mere receipt of income from the property leased, and the receipt of interest and dividends from invested funds, bank balances, and the like, and the distribution thereof among the stockholders, amounts to no more

than receiving the ordinary fruits that arise from the ownership of property.

36 Stat., Sec. 28, Ch. 6, Pages 11, 112, 117.

McCoach vs. Minehill, Etc. Ry. Co., 228 U. S. 295-300.

ARGUMENT

The lease in question (Trans. Record, p. 18 *et seq.*) states among other things:

First. The lessor hereby leases to the lessee, its successors and assigns, from the first day of July, 1907, for the term of five years then next ensuing, the railroad of the lessor, together with all equipment and appurtenances of every kind and nature whatsoever to the said railroad belonging or appertaining.

Third. The lessee (The Oregon Railroad & Navigation Company) will operate the said railroad and will pay the expenses of operation, maintenance, repairs and renewals thereof, and all incidental expenses connected therewith, and the sums payable for taxes and assessments upon the demised premises."

It is conceded that the defendant in error did not operate the railroad in question during the taxing year of 1910, but the Government contends that the defendant in error was doing business within the taxing year, by reason of engaging in activities, such as maintaining general offices in the City of Portland, maintaining its corporate existence by the holding of stockholders' meetings and the business incident thereto, in collecting the income and rents accruing by virtue of the lease of its

property, managing its finances, reimbursing the lessee for the construction of a warehouse track and passing track and a cattle passway, cancelling the lease in question, selling the property and paying its bonded indebtedness, as well as paying its state annual corporate licenses.

The Corporation Tax Law (Act of August 5, 1909, Sec. 38, 36 Stat., Ch. 6, pp. 11, 112-117), provides: "That every corporation * * * organized for profit * * * and having a capital stock represented by shares * * * and engaged in business in any state * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation * * * equivalent to one per centum upon the entire net income over and above $5,000.00 received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations * * * subject to the tax imposed.

"Such net income shall be ascertained by deducting from the gross amount of the income of such corporation * * * received within the year from all sources (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges, such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property. * * *"

Our position is that the defendant in error was organ-

ized for the purpose of operating a railroad, and on the 29th day of June, 1907, it leased its entire railroad to the Oregon Railroad & Navigation Company, which lessee company undertook and did operate said railroad until the 23rd day of December, 1910, at which time the property of the defendant in error, as well as the property of the Orgon Railroad & Navigation Company, the lessee, was sold to the Oregon-Washington Railroad & Navigation Company.

The United States Supreme Court has held that the statute imposed a special excise tax * * * not upon the franchise of a corporation, irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate business and with respect to the carrying on thereof * * * the tax is not payable unless there be a carrying on or doing of business in a corporate capacity, and this is made the occasion for the tax, measured by the standard prescribed. The difference between the acts (that is to say, the act in question and the Income Tax Act held to be unconstitutional in the Pollock Case) is not merely nominal, but rests upon substantial differences between the mere ownership of property and the actual doing of business in a certain way. Flint vs. Stone Tracey Co., 220 U. S. 144-45-50.

Having in mind the substantial distinction thus clearly indicated by this court, the question in the present case reduces itself to this: Whether the Snake River Valley Railroad Company's stockholders in their corporate capacity are mere landlords—owners, that is, of the property from which they derive an income—or whether

they are actually engaged in business within the meaning of the act.

The act and the decisions clearly show that it was the intent and purpose of Congress to tax the railroad activities of a corporation when the corporation was engaged in the business for which it was organized, and that it is not the intent of Congress to tax a corporation which has leased its entire railroad to another concern, which is operating the road, and is doing nothing more than receiving the ordinary fruits that arise from the ownership of property.

We believe that the United States Supreme Court and other Federal Courts have expressly held, that each and every activity which the Government advances as the doing of business by the Snake River Valley Railroad Company, during the taxing year of 1910, does not constitute a doing of business within the meaning of the act, and amounts to nothing more than maintaining the investment, collecting the income and such other incidental matters arising therefrom.

The leading case on this question is McCoach vs. Minehill Railroad Co., 228 U. S. 295, in which the Court states, among other things:

"A railroad corporation which has leased its railroad to another company, operating it exclusively, but which maintains its corporate existence and collects and distributes to its stockholders the rental received from the lessee, and also dividends from the investments, is not doing business within the meaning of the Corporation Tax Act." The Court saying (page 303): "In our opinion, the mere receipt of income from the property

leased (the property being used in business by the lessee and not by the lessor), and the receipt of interest and dividends from invested funds, bank balances, and the like, and the distribution thereof, amount to no more than receiving the ordinary fruits that arise from the ownership of property. * * * The distinction is between (page 308):

"(a) The receipt of income from outside property or investments, by a company that is otherwise engaged in business, in which event the investment income may be added to the business income, in order to arrive at the measure of tax, and

"(b) The receipt of income from property or investments by a company that is not engaged in business, except the business of owning the property, maintaining the investments, collecting the income and dividing it among the stockholders. In the former case the tax is payable, in the latter not."

In United States vs. Whitridge, 231 U. S. 144, the Court held that a receiver operating a streetcar system was not doing business within the meaning of the Corporation Tax Law. The Court said (page 148):

"The Corporation Tax Law imposed an excise tax on the doing of business by corporations, and not in any sense tax on property or upon income merely as such. * * * It does not in terms impose a tax upon corporate property or franchises as such, nor upon the income arising from the conduct of business unless it is carried on by the corporation. * * * It does not impose a tax upon the income derived from the management of corporate property by receivers under the conditions of this case."

In Flint vs. Stone Tracy Co., 220 U. S. 107-145, it was said: "The tax is imposed, not upon the franchises of a corporation, irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business, and with respect to the carrying on thereof, in a sum equivalent to one per centum upon the entire net income over and above $5,000.00, received from all sources during the year, and when imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described. As the latter organizations share many benefits of corporate organization, it may be described generally as a tax upon the doing of business in a corporate capacity."

This interpretation was followed and made the basis of the decision in McCoach vs. Minehill Railroad Co., 228 U. S. 295-300, and U. S. vs. Whitridge, 231 U. S. 144-48, and again in Zonne vs. Minneapolis Syndicate, 220 U. S. 187-191, in which last mentioned case the Court observed:

"A corporation, the sole purpose whereof is to hold title to a single parcel of real estate, subject to a long lease, and for convenience of the stockholders, to receive and distribute the rentals arising from such lease and proceeds of disposition of the land, and which has disqualified itself from doing any other business, is not a corporation doing business within the meaning of the corporation tax provisions of the Act of August 5, 1909, Sec. 38, 36 Stat., Chap. 6, pages 11, 112-117, and is not subject to the tax."

In New York Central Ry. Co. vs. Gill, 219 Fed. 184-185, the rule laid down in McCoach vs. Minehill Railroad Co., 228 U. S. 295, was again followed. It appeared that the railroad leased its property to another railroad corporation, which operated the same, the lessor continuing its corporate existence only for the purpose of collecting the rental and maintaining the investment and doing other things incident thereto. The Court held that such activities was not "doing business" within the meaning of the act.

The same result was reached in United States vs. Nipissing Mines Co., 206 Fed. 431-433, in which it appeared the defendent corporation was organized to own the stock of a mining company, and had no assets except such stock, a small amount in the bank, office furniture, etc., and did nothing other than receive dividends from the operating company and distribute them as such among its own stockholders. It was held this was not "doing business" within the meaning of the act.

In an effort to make it appear that the receipt of income under the lease, constitutes a doing of business, the Government refers to the real estate company cases argued and decided in Flint vs. Stone Tracy Co., 220 U. S. 111. These were all cases in which the corporate charters showed that the managing, leasing and selling of property was the purpose which had led to the formation of these companies. The making of leases as a means of exploiting property was one of the corporate objects. The right to deal in real estate by lease or sale was a consequence of the franchise; the corporation was chartered to manage and make sales of real estate,

and was so engaged. It follows, of course, it was doing the business for which it was formed and existed. If the activity is the managing and rental of real estate for profit, then to engage in that activity is the doing of business, and it was so held in the cases referred to.

It was in reference to these cases that the United States Supreme Court said, in the Zonne case: "We have held in the proceeding cases that corporations organized for profit under the laws of the state, authorized to manage and rent real estate, and being so engaged, are doing business within the meaning of the law, and are therefore liable to the tax imposed."

But the real estate cases are not authority for the proposition, that a corporation chartered to operate a railroad, but which has leased its entire railroad to another company, and has practically gone out of business and thus divested itself of all its railroad and authority so to operate, can ever be taxed as doing business, simply because it owns the property and maintains its investment.

It is significant, that in no one of the real estate cases, did their counsel make the argument that the corporations had gone out of business, and the reason was two-fold: First, the companies had not gone out of business, but were engaged in the business for which they had been chartered; second, even if the companies had gone out of business, they dared not plead this for an excuse, because the result would have been the forfeiture of their charter for non-user.

It is clear, therefore, that the case at bar is governed and controlled by the McCoach case, 228 U. S. 295, and

the Zonne case, 220 U. S. 187, and the Whitridge case, 231 U. S. 144, and other cases following and adopting the rule laid down in these cases, as shown under Points and Authorities No. 1.

We submit, therefore, that the Snake River Valley Railroad Company was not doing business within the meaning of the Corporation Tax Law during the taxing year of 1910, and that the railroad company's demurrer to the Government's further and separate answer was properly sustained and the judgment entered thereon in favor of the defendant in error should be affirmed.

Respectfully submitted,

W. W. COTTON,
A. C. SPENCER,
W. A. ROBBINS,
Attorneys for Defendant in Error.